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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 306

LOUIS A. JOHNSON, SECRETARY OF DEFENSE OF THE UNITED STATES, ET AL., PETITIONERS

v.

LOTHAR EISENTRAGER, ALIAS LUDWIG EHRHARDT, ON HIS OWN BEHALF AND AS NEXT FRIEND OF FRANZ SIEBERT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals (R. 53-62) is reported at 174 F. 2d 961. The opinion of the District Court (R. 16-17) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 15, 1949 (R. 63) and a petition for re-

hearing (R. 64-65) was denied on June 6, 1949 (R. 66). The petition for a writ of certiorari was filed on September 1, 1949, and was granted on November 14, 1949 (R. 69). The jurisdiction of this Court rests upon 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether the District Court for the District of Columbia has jurisdiction to issue writs of habeas corpus on behalf of enemy aliens confined in Germany by officers of the United States Army to enforce the sentence of an American military commission imposed after trial and conviction for violations of the laws of war.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Article I, § 9, cl. 2 of the Constitution provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

28 U. S. C. [1948 rev.] 2241 [1] provides in pertinent part:

§ 2241. *Power to grant writ.*

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the

[1] This section, like all other sections of the 1948 revision of Title 28 of the United States Code, became effective September 1, 1948 (Act of June 25, 1948, c. 646, § 38, 62 Stat. 992). The petition for a writ of habeas corpus which gave rise to the present proceeding was filed prior to this effective date, on April 26, 1948 (R. 2-7), but the order denying the

district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

* * *

STATEMENT

On April 26, 1948, a petition for a writ of habeas corpus (R. 2-7; and see R. 7-8, 12-13, 15-16, for various amendments thereof) was filed in the United States District Court for the District of Columbia by respondents, 21 German nationals now confined in Landsberg Prison, Germany, in the American occupation zone, in the custody of the United States Army. The writ was sought to be directed to the Secretary of Defense, the Secretary of the Army, and the four Joint Chiefs of Staff of

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petition was entered after the effective date, on September 30, 1948 (R. 16). The pertinent subsection (a) of §2241 of the 1948 revision, however, introduced no substantive change in existing law. It merely consolidated, "with changes in phraseology necessary to effect the consolidation," §§ 451 and 452 of previous editions of Title 28 (R.S. §§ 751 and 752, as amended). See Reviser's Note to 28 U.S.C. [1948 rev.] 2241. These sections had read:

"§ 451. The Supreme Court and the district courts shall have power to issue writs of habeas corpus.

"§ 452. The several justices of the Supreme Court and the several judges of the circuit courts of appeal[s] and of the district courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty. A circuit judge shall have the same power to grant writs of habeas corpus within his circuit, that a district judge has within his district; and the order of the circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had."

the United States (Chief of Staff to the Commander in Chief, United States Army and Navy; Chief of Staff, United States Army; Chief of Naval Operations; and Commanding General, United States Army Air Forces), all of whom, the petition alleged, "are located within the District of Columbia" and "have jurisdiction and supervision over the official acts of the said Commandant of Landsberg Prison" (R. 2, 12).

The petition, as amended, alleged that the prisoner-applicants for the writ had all been "employed by various civilian agencies of the German Government in Shanghai, Canton, and Peiping, in China" on and before May 8, 1945, when Germany surrendered to the Allies (R. 2, 8); that on January [illegible], 1947, they were found guilty,[2] following a trial by a United States Military Commission appointed by the Commanding General of the Nanking Headquarters Command, of "alleged violation of the laws of war" "by engaging in, permitting, or ordering military activity against the United States between the German surrender of May 8, 1945, and the cessation of Japanese hostilities on August 15, 1945," and sentenced to confinement at hard labor for periods ranging from five years to life imprisonment (R. 3-5); and that on May 10, 1947, Major General John P. Lucas, Chief of the United States Army Advisory Group, China (successor to

[2] Six codefendants of the respondents were found not guilty (R. 3).

the Nanking Headquarters Command), "acting as Reviewing Authority of the Military Commission," approved all the sentences (with certain remissions),[3] and ordered them executed, designating Landsberg Prison as the place of confinement (R. 6). The prisoners charged in their petition that their trial, conviction, and present detention were "in violation of Articles I and III of the Constitution of the United States and of the Fifth Amendment thereto, and of other provisions of said Constitution and laws of the United States and of certain provisions of the Geneva Convention of July 27, 1929, relative to the treatment of prisoners of war" (R. 6).[4]

A rule to show cause was issued (R. 7), to which a return was made (R. 9-11; and see R. 14-15 for amendments thereof) admitting some and denying

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[3] One 30-year sentence was reduced to 20 years, and two 5-year sentences were reduced to two years (R. 6).

[4] Specifically, it was charged that the Military Commission was without jurisdiction, or had violated the applicants' rights, because (a) the offenses with which the applicants had been charged did not constitute offenses against the laws of war; (b) there had been no "hostilities, martial law, or American military occupation of China" when the alleged offenses occurred; (c) the rules of procedure for the trial, and the trial itself, violated rights guaranteed to prisoners of war by Article 63 of the Geneva Convention to a trial "by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining power"; (d) the United States had neglected to give "notice of the trial to the protecting power of Germany," as required by the Geneva Convention; and (e) the applicants, "at no time having been members of the armed forces of a nation at war with the United States but having been at all times civilian employees of civilian governmental agencies, * * * were not belligerents" (R. 6, 8).

others of the allegations of the petition. An "answer" to the return, in the nature of a traverse, was also filed (R. 11-12). In view of the court's disposition of the petition for the writ (*infra*), however, it is unnecessary further to detail the various allegations of the pleadings.[5]

On September 30, 1948, the District Court (Tamm, D.J.) entered an order dismissing the petition for lack of jurisdiction (R. 16). In an accompanying opinion (R. 16-17), Judge Tamm pointed out that the applicants for the writ "admittedly are not now and have never been in the United States" (R. 16), and, accordingly, on the authority of *Ahrens* v. *Clark*, 335 U. S. 188, held that the court was without power to issue the writ "in cases in which the petitioners are not physically within the jurisdiction of the court" (R. 17).

Upon appeal, the United States Court of Appeals for the District of Columbia Circuit held that the District Court has jurisdiction, at the instance of persons who are detained beyond the territorial limits of all federal district courts by officials of the United States, and who can show that their confinement is in violation of a prohibition of the Constitution, to entertain a petition for a writ of habeas corpus directed to those officials resident in the District of Columbia who have ulti-

[5] It is likewise unnecessary, for the same reason, to summarize the contents of the various exhibits attached to the petition for the writ (R. 18-43) and to the return to the show-cause order (R. 44-52).

mate authority over the immediate jailer. The judgment of the District Court was accordingly reversed and the cause remanded to determine whether such authority exists in the officials named as respondents, or any of them, and if so, to pass upon the merits of the petition (R. 62, 63).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the District Court for the District of Columbia has jurisdiction to issue writs of habeas corpus on behalf of enemy aliens confined beyond the territorial limits of that court and other federal courts, pursuant to the judgment and sentence of an American military commission imposed after trial and conviction for violations of the laws of war.

2. In holding that non-resident alien enemies detained for commission of war crimes have legal rights under the Constitution, laws, and treaties of the United States which may be asserted in United States courts.

3. In holding that persons who do not have actual physical custody of the prisoners may properly be named as respondents to a petition for a writ of habeas corpus.

4. In reversing the judgment of the District Court dismissing the petition for a writ of habeas corpus for lack of jurisdiction.

SUMMARY OF ARGUMENT

I

A. A federal district court is without jurisdiction to grant a writ of habeas corpus where the applicant for the writ is held in custody beyond the court's territorial jurisdiction. *Ahrens* v. *Clark*, 335 U. S. 188. Though the relators in the *Ahrens* case were confined within the territorial jurisdiction of a different district court from that in which the writs were sought—unlike the relators here, who are confined abroad and hence beyond the territorial jurisdictions of all district courts—that fact is irrelevant, under the rationale of the *Ahrens* case, and so cannot serve as a valid basis of distinction. For, *Ahrens* did not decide merely that the particular district court in which the writs were sought was justified, as a matter of discretion, in declining to exercise admitted jurisdiction because there existed another forum to which the applications for the writs should more appropriately have been addressed; but, rather, that the presence of the relators within the territorial confines of the district court in which the writs were sought was an essential prerequisite to the court's power to act.

B. Our contention that Congress never intended that the District Court for the District of Columbia should have power to issue writs of habeas corpus on behalf of prisoners confined outside the District

is supported not only by the habeas corpus provisions of the federal statutes generally applicable throughout the United States (particularly 28 U.S.C. §§ 2241 and 2242), but also by § 16-801 of the District of Columbia Code, which expressly limits the local district court's jurisdiction to issue such writs to cases of restraint "within the District."

C. The statutes of the states and territories, either in explicit terms or by clear implication, limit jurisdiction to issue writs of habeas corpus to cases where the prisoner-relators are confined within the territorial limits of the state or territory, or lesser political units. This is persuasive evidence that this limitation inheres in the very nature of the writ as inherited from the common law, and that Congress, in enacting the federal habeas corpus statutes, never intended to make the writ perform a broader function.

D. At common law, the writ of habeas corpus ran throughout England proper and to all the "dominions of the Crown." The early common-law decisions dealing with the territorial reach of the writ shed no light on the precise jurisdictional question involved in this case—*i.e.*, whether the writ was issuable to test the legality of the restraint of a prisoner detained on foreign soil by a jailer subject to the authority and control of an official who was within reach of the court's processes. However, Parliament, by enacting the Habeas

Corpus Act of 1679, which imposed severe penalties on jailers who transported prisoners "beyond the seas" for the purpose of evading service of writs of habeas corpus, would appear to have implicitly recognized that such removals defeated the jurisdiction of the English courts. In addition, modern English judicial authority supporting our contention that detention within the court's territorial jurisdiction is an essential prerequisite is to be found in at least one of the judgments in *Rex* v. *Earl of Crewe,* [1910] 2 K.B. 576, 102 Law Times Rep. 760 (C.A.), and also in the case of *In re Ning Yi-Ching and Others,* 56 Times Law Rep. 3, decided in 1939.

II

Though the persons named as respondents in the petition for the writ (petitioners in this Court)—the Secretary of Defense, the Secretary of the Army, and the Joint Chiefs of Staff of the United States—have ultimate directive authority over the immediate jailer of the prisoner-relators, they clearly do not have "immediate" or "actual physical" custody of the prisoners. It is doubtful, therefore, whether these highest officials of the military establishment can be considered "person[s] having custody of the person[s] detained" within the meaning of 28 U.S.C. 2243, which directs that writs of habeas corpus "shall be directed to" such persons. Cf. *Wales* v. *Whitney,* 114 U.S. 564, 574. Even though these officials might be able to effectuate a court mandate ordering the

prisoners' discharge, that practical consideration does not remove our doubts that Congress intended the writ to be issued to them. Moreover, permitting the writ to issue to parties such as petitioners foreshadows attempts to bring suit against any of the superiors of the actual custodian, including, perhaps, the President himself; and there will be unnecessary difficulties due to changes in supervision of overseas affairs, such as the recent transfer of authority, respecting occupied Germany, to the State Department. It may be that this objection to the parties is one which can be waived, but, if so, there has been no waiver here.

III

The duty which would devolve upon the District Court for the District of Columbia under the decision below—that of entertaining, considering, and passing upon every application for a writ of habeas corpus, emanating from any place in the world outside the United States, provided the applicant is detained by American officials purporting to act in their official capacities and makes the requisite allegation that his detention is somehow illegal—would constitute a burden so great that it is highly improbable that Congress ever contemplated such a result. Many of such petitions could be expected to present difficult problems of jurisdiction and possibly delicate questions of international law and foreign affairs. Many would necessitate issuance of the writs, followed by hearings requiring the attendance of distant witnesses,

And it is clear that the potential number of such applications is enormous. If it be thought that the validity of the confinement of every person detained by American officials in foreign lands should be subject to judicial scrutiny by writ of habeas corpus, legislation equitably distributing the burden of entertaining petitions for such writs among the different judicial districts, or setting up special courts for this purpose, is the answer to the problem.

IV

Alien enemies confined abroad are not entitled by the Constitution to the writ of habeas corpus, and there is therefore no occasion to attempt to construe the habeas corpus statutes as conferring upon the District Court for the District of Columbia, or upon any other district court, jurisdiction to inquire into the legality of their detention elsewhere in the world.

1. Granting that American officials are subject to the Constitution wherever they act, and that action in violation of the Constitution is void, it does not necessarily follow, as the court below assumed, that a *judicial* remedy is available to contest that action. There are many instances, particularly in the realm of foreign affairs and the conduct of war, in which the Executive is the primary and often the sole guardian of the Constitution. The President's authority in these spheres is an executive power, for which he is normally "responsible to the Constitution," and not to the courts.

An alien detained abroad by deputies of the President must seek redress for invaded rights through the executive and administrative machinery instituted for that purpose, as well as through the good offices of his own country's government.

2. Equally doubtful is the view of the court below that the habeas corpus statutes—if interpreted as not vesting power in the District of Columbia District Court to issue writs of habeas corpus where the alien-enemy applicants are detained beyond the territorial jurisdiction of all district courts—violate the constitutional prohibition against suspending the privilege of the writ except in time of rebellion or invasion. With full deference to the view that the writ of habeas corpus is a basic safeguard of liberty, we gravely doubt that the Constitution's draftsmen contemplated it as a method of setting aside, through the intervention of our domestic courts, all *ultra vires* actions by government officials any place in the world, even though such actions might affect only aliens or enemy aliens. The amplitude of the writ, as referred to in the Constitution, is probably no greater than it was at common law, and there is no authority for the proposition that it was then available in behalf of aliens confined in a foreign country. On the contrary, such authority as exists points the other way.

3. There is, moreover, no basis for holding that enemy aliens located and held in enemy territory have any substantive rights under our Constitution

or laws which may be prosecuted through the writ of habeas corpus. The rights of these enemy aliens all flow from and must be vindicated within the framework of the system established for the occupation of their country. Cf. *Neely* v. *Henkel*, 180 U. S. 109; *In re Ross*, 140 U. S. 453, 464.

4. We do not believe that the Court must necessarily reach the question of whether the writ of habeas corpus is, and must be, available to citizens detained in a foreign country, and, if so, in what court it would lie. There are sound bases for distinguishing between citizens and aliens in this respect, as we think the foregoing discussion suggests.

V

If, however, it be thought that the issue here must be resolved as if petitioners were citizens, we would maintain that the Constitution does not entitle any person, citizen or alien, to habeas corpus as of right to test the legality of his detention abroad by American officials. The constitutional prohibition against suspension of the writ appears to have been designed to preserve the scope of the writ as it was then known, and the pre-Revolutionary history of habeas corpus cannot easily be harmonized with a claim of extra-territorial reach of the writ. Moreover, this Court has announced the fundamental principle that the Constitution, and particularly its specific prohibitions and requirements, have no operation in another country. See *In re Ross*,

140 U. S. 453, upholding the constitution and procedure of American consular courts in the Far East.

In particular, *Neely* v. *Henkel*, 180 U. S. 109, held the constitutional provision as to habeas corpus inapplicable to an American held in American-occupied Cuba after the War of 1898. The circumstances of that case are entirely comparable to those presented by the current occupations of enemy territory, and citizens now detained overseas are equally without the constitutional right to invoke the writ. It may be that it would be wise and just to make habeas corpus accessible in these circumstances, but, as with other such privileges, it is for Congress to make that choice.

ARGUMENT

I

A Federal District Court Is Without Jurisdiction to Issue a Writ of Habeas Corpus Where the Prisoner-Applicant Is Confined Beyond the Territorial Jurisdiction of the Court, Regardless of Whether He Is or Is Not Confined Within the Territorial Limits of Some Federal Court Having Jurisdiction to Issue the Writ

A. The Ahrens decision.—In *Ahrens* v. *Clark*, 335 U. S. 188, this Court held that the District Court of the United States for the District of Columbia (now the United States District Court for the District of Columbia)[6] was without jurisdiction to

[6] By §§ 88 and 132 (a) of new Title 28 of the United States Code, effective September 1, 1948 (Act of June 25, 1948, c. 646, § 38, 62 Stat. 992), the District Court for the District of Columbia was formally made an integral part of the federal judicial system, and its former name—the "District Court of the United States for the District of Columbia" (see D. C. Code (1940 ed.), § 11-301)—was changed to the "United States District Court for the District of Columbia."

issue writs of habeas corpus on behalf of a group of German aliens confined at Ellis Island, New York, awaiting deportation under removal orders issued by the Attorney General. The basis of this holding was the Court's determination that the words "within their respective jurisdictions," as used in 28 U. S. C. [1946 ed.] 452 (quoted in footnote 1, *supra*, pp. 2-3),[7] "limit the district courts to in-

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[7] As explained in footnote 1, this section and the immediately preceding section (451) of 28 U.S.C. [1946 ed.] were, effective September 1, 1948, consolidated and enacted into positive law, with merely phraseological changes, as § 2241 of new Title 28 of the United States Code.

The Court seems to have assumed without discussion that 28 U.S.C. [1946 ed.] 452 was the pertinent statute to be construed in the *Ahrens* case, rather than § 16-801 of the District of Columbia Code (1940 ed.), providing that "Any person committed, detained, confined, or restrained from his lawful liberty *within the District*, under any color or pretense whatever, * * * may apply by petition to the District Court of the United States for the District of Columbia, or any justice thereof, for a writ of habeas corpus, to the end that the cause of such commitment, detainer, confinement, or restraint may be inquired into; and the court or the justice applied to, if the facts set forth in the petition make a prima facie case, shall forthwith grant such writ, directed to the officer or other person in whose custody or keeping the party so detained shall be, * * *" [italics added].

Since the *Ahrens* case arose and was decided prior to September 1, 1948, when the District Court for the District of Columbia was for the first time expressly integrated into the general federal judicial system, and made in all respects one of the "United States District Courts" (see footnote 6, *supra*), it would seem to be arguable that the special habeas corpus statute applicable to the District of Columbia, quoted in the preceding paragraph, was applicable in that case, rather than 28 U.S.C. [1946 ed.] 452, the general federal statute creating habeas corpus jurisdiction. Cf. *Dorsey* v. *Gill*, 148 F. 2d 857, 867 (C.A. D.C.), certiorari denied, 325 U.S. 890; *Downey* v. *United States*, 91 F. 2d 223, 227 (C.A. D.C.); *McGowan* v. *Moody*, 22 App. D.C. 148, 156. On the other hand, by the Act of March 3, 1901, c. 854, § 61, 31 Stat. 1199, as amended (D.C. Code (1940 ed.), § 11-305), it was provided

quiries into the causes of restraints of liberty of those confined or restrained within the territorial jurisdiction of those courts" (335 U. S. at 190). The decision was not merely that the circumstances of that case were such that the district court, though having power to act, was justified, in the exercise of sound judicial discretion, in declining to assert its jurisdiction because there existed another forum with jurisdiction to which the applications for the writs should more appropriately or conveniently have been addressed. Rather, the decision was that the presence of the petitioners within the territorial confines of the district court was an essential jurisdictional prerequisite attached by Congress to the court's power to act at all. This is clear enough from the majority opinion in the *Ahrens* case,[8] and

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that the District Court for the District of Columbia "shall possess the same powers and exercise the same jurisdiction as the District Courts of the United States, and shall be deemed a court of the United States."

In any event, the point would appear to be without importance or significance in the present case, since the District Court for the District of Columbia is now an integral part of the federal judicial system, and hence clearly subject to the general federal habeas corpus statutes rather than to the special habeas corpus provisions of the District of Columbia Code, at least where there is any inconsistency between them.

[8] See, particularly, 335 U. S. at 193, where it was said:

"Respondent is willing to waive the point [the absence of the petitioners from the District of Columbia], so that we may make a decision on the merits. But the restriction is one which Congress has placed on *the power of the District Court to act*. Hence it may not be waived by the parties. [Citing *United States* v. *Griffin*, 303 U. S. 226, 229.]

* * * * *

"*Since there is a defect in the jurisdiction of the District Court* which remains uncured, we do not reach the question

becomes even clearer when the majority opinion is read in conjunction with the dissent of Mr. Justice Rutledge.[9] See, especially, 335 U. S. at 202, where Mr. Justice Rutledge stated that—

> * * * it is important to emphasize that the alternative to the Court's holding is not that petitioners have a right to be heard in a distant court whenever the Attorney General may there be served. Rather the alternative is that their absence from the district is a circumstance which normally would induce the court to exercise its discretion to decline jurisdiction, but which may be disregarded in exceptional circumstances if the respondent so desires or if the court finds that justice in the particular circumstances so demands.

It is true that the Court in the *Ahrens* case reserved "the question of what process, if any, a person confined in an area not subject to the jurisdiction of any district court may employ to assert federal rights" (335 U. S. at 192, footnote 4). But, as observed by Mr. Justice Rutledge in his dissent (335 U. S. at 209):

> * * * if absence of the body detained from the territorial jurisdiction of the court having jurisdiction of the jailer creates a total and irremediable void in the court's capacity to

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whether the Attorney General is the proper respondent * * * and, if not, whether the objection may be waived, as respondent is willing to do. [Citing *Ex parte Endo*, 323 U.S. 283, 305-307.]" (Italics added.)

[9] Joined in by Mr. Justice Black and Mr. Justice Murphy.

> act, what lawyers call jurisdiction in the fundamental sense, then it is hard to see how that gap can be filled by such extraneous considerations as whether there is no other court in the place of detention from which remedy might be had * * *.

If, in other words, a court lacks *power to act* because the applicant for relief is without its territorial confines, the fact that no other court happens to have power to act is, perforce, an irrelevant consideration. See Fairman, *Some New Problems of the Constitution Following the Flag,* 1 Stanford L. Rev. 587, 632. For, as stated in *McGowan* v. *Moody,* 22 App. D. C. 148, 158,[10] which is cited with apparent approval in the *Ahrens* opinion (335 U. S. at 190):

> The question is one of power, and not of the expediency of its exercise in the particular case, because there may happen to be no other tribunal in which relief might be had.

It is also true that the author of the majority opinion in the *Ahrens* case has since aligned himself with the view of the court below that, where a person is confined in an area not subject to the jurisdiction of any district court, judicial power

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[10] The *McGowan* case held that the Supreme Court of the District of Columbia (now the United States District Court for the District of Columbia) was without jurisdiction to issue a writ of habeas corpus, directed to the Secretary of the Navy, on behalf of an enlisted man in the United States Marine Corps allegedly confined without lawful cause on the island of Guam.

to issue the writ resides in that court which has within reach of its process a respondent who possesses directive power over the immediate jailer (Mr. Justice Douglas, concurring in *Hirota* v. *MacArthur*, 338 U. S. 197, 199-203).[11] But, for the reasons stated above, we think that the fundamental basis of the *Ahrens* decision—the *ratio decidendi*—does not permit of such a conclusion. The holding in that case was that where there is no detention within the district, there is by congressional mandate a total absence of power to issue the writ—not merely that the fact of detention outside the district justifies or requires the non-assertion of admitted power in the interest of orderly administration. And, that being so, as we have said, both reason and authority dictate that the result cannot be otherwise merely by virtue of the extrinsic con-

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[11] Mr. Justice Douglas explained, in his concurring opinion in the *Hirota* case, his interpretation of what the Court held in *Ahrens*, as follows (338 U.S. at 201-202):

"* * * In *Ahrens* v. *Clark*, *supra*, we were dealing with the distribution of judicial power among the several District Courts. * * * We held that the court at the place of confinement was the court to which application must be made. But it does not follow that, where that place is not within the territorial jurisdiction of any District Court, judicial power to issue the writ is rendered impotent.

"* * * In *Ahrens* v. *Clark*, *supra*, denial of a remedy in one District Court was not a denial of a remedy in all of them. There was a District Court to which those petitioners could resort. * * *.

* * * * *

"* * * The allocation of jurisdiction among the District Courts, recognized in *Ahrens* v. *Clark*, is a problem of judicial administration not a method of contracting the authority of the courts so as to delimit their power to issue the historic writ."

sideration that the place of detention happens not to be within the territorial limits of any federal court.

B. *The federal statutes and the District of Columbia Code.*—It seems clear from a reading of the habeas corpus provisions of the general federal statutes as a whole (28 U.S.C. [1948 rev.] 2241-2255) that Congress never contemplated that a federal court or judge should have power to issue a writ of habeas corpus where the prisoner-applicant for the writ was not confined within the territorial jurisdiction of such court or judge. The *Ahrens* opinion mentions some of the legislative indicia of this congressional intent (see 335 U. S. at 189-191), especially the limiting words "within their respective jurisdictions" in § 2241 (formerly 28 U.S.C. [1946 ed.] 452). Further evidence is to be found in the fourth paragraph of § 2242, providing that—

> If addressed to the Supreme Court, a justice thereof or a circuit judge it [*i.e.*, the application for the writ] shall state the reasons for not making application to the district court of *the district in which the applicant is held.* [Italics added.]

And the second sentence of § 2241(a) (see pp. 2-3, *supra*) states that—

> The order of a circuit judge [granting a writ of habeas corpus] shall be entered in the records of the district court of *the district*

wherein the restraint complained of is had. [Italics added.]

The District of Columbia Code makes it even clearer that jurisdiction to issue the writ is limited to cases where the person confined is within the District. Section 16-801 of the Code (1940 ed.), as we have pointed out (footnote 7, *supra*, p. 16) expressly limits the jurisdiction to issue the writ to cases of restraint "within the District." See *McGowan* v. *Moody*, *supra*, 22 App. D. C. 148, 156, where it was conceded on all sides that, if the local District Court (then the Supreme Court of the District of Columbia) derived its habeas corpus jurisdiction exclusively from this Code provision, there was no power to issue the writ where the applicant was detained outside the District—in that case, on the island of Guam.[12] See also *Ex parte Flick*, 76 F. Supp. 979 (D.D.C.),[13] where it was held (Holtzoff, D. J.), on the authority of the *McGowan* case, that the District Court lacked jurisdiction to issue a writ of habeas corpus to inquire into the legality of the detention of a German alien

[12] It was argued on behalf of the appellant in the *McGowan* case that the then Supreme Court of the District of Columbia had, in addition to the powers conferred on it by the Code, "all the jurisdiction in the premises that belonged to the court of King's bench in England under the common law" (22 App. D. C. at 156-157). The court assumed, for argument, that this was true, and decided that even so there was no power to issue the writ.

[13] Affirmed on other grounds (the international character of the tribunal that convicted Flick) *sub nom. Flick* v. *Johnson*, 174 F. 2d 983 (C.A. D.C.), certiorari denied, 338 U.S. 879.

confined in Nuernberg, Germany, by virtue of a judgment and sentence of a military tribunal sitting in that city.[14] Cf. *Sanders* v. *Bennett*, 148 F. 2d 19 (C.A. D. C.).

It is true that for some years prior to this Court's decision in the *Ahrens* case the District Court for the District of Columbia entertained petitions for writs of habeas corpus filed by prisoners confined in the District of Columbia Reformatory at Lorton, Virginia, and the District Workhouse at Occoquan, Virginia. This practice appears to have had its origin in the case of *Sanders* v. *Allen*, 100 F. 2d 717, 718-719 (C.A. D. C., 1938), where it was pointed out that these institutions were controlled and staffed by District officials, were integral parts of the local jail system, and were located in Virginia only because of a lack of available and suitable land in the District for the purpose. The situation was described by the court as "sui generis and as in no way analogous to sentence and confinement of a prisoner convicted of a violation of a United States statute in one of the other Federal District Courts, sitting in one of the States. In other words, the problem here is local and has no relation to federal procedure generally" (100 F. 2d at 719). The court made it clear, moreover, that, in deciding that the local Dis-

[14] The basis of the District Court's *Flick* decision, though the decision itself was affirmed by the Court of Appeals on other grounds (see footnote 13, *supra*), was, of course, in effect overruled by the decision below in the instant case.

trict Court had jurisdiction in the peculiar circumstances of that case, it was not departing "in the slightest degree" from the principle of the *McGowan* decision (*ibid.*). Subsequent decisions of the Court of Appeals reaffirmed the principle of the *Allen* decision, always, however, limiting it to its special facts. See *Sanders* v. *Bennett, supra,* 148 F. 2d 19; *Burns* v. *Welch,* 159 F. 2d 29. In consequence of this Court's decision in the *Ahrens* case, however, even the limited exception to the general rule which those cases established has now been abrogated, and the strict principle requiring physical presence within the District of the applicant for habeas corpus in order for jurisdiction to exist has been reverted to.[15] *McAffee* v. *Clemmer,* 171 F. 2d 131 (C.A. D.C.); *Butler* v. *Clemmer,* 171 F. 2d 132 (C.A. D.C.).

C. *State and territorial legislation.*—Each of the 48 states and the several territories of the United States has detailed legislation on the subject of the writ of habeas corpus.[16] These statutes follow the general pattern fixed by the English Habeas Corpus Act of 1679, 31 Car. II, c. 2,[17] with, however, numerous changes and additions, varying from

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[15] With, of course, the new exception created by the decision below in the case at bar.

[16] The state and territorial habeas corpus statutes, as they existed in 1923, are collected in Scott and Roe, *The Law of Habeas Corpus,* pp. 515-997. Only in isolated instances have the statutes been amended in matters of substance since the publication of this work.

[17] See pp. 37-41, *infra,* for a discussion of this most celebrated of the English habeas corpus acts. It has been referred

state to state, designed to meet modern conditions. Hurd, *The Writ of Habeas Corpus* (2d ed. 1876), pp. 122-128. While it is recognized, of course, that the provisions of these statutes have no authoritative bearing on the question of the reach of the writ under federal law, it is not without significance, we think, that in every instance, either in explicit terms or by clear implication, jurisdiction to issue the writ is limited by these statutes to cases where the detained petitioner is confined within the territorial limits of the state or territory, or even within narrower limits (the county, district, etc.) where the jurisdiction of the court or judge issuing the writ has narrower territorial jurisdiction. This universal conception of the writ as being thus jurisdictionally limited to the territory where the detained person is confined is persuasive evidence that this limitation inheres in the very nature of the historic writ, and that there was no intention on the part of Congress, when it enacted the federal habeas corpus statutes, to make the writ perform a broader function.

In the following jurisdictions, the territorial limitation is expressly contained either in the statutory section creating the right to the writ,[18]

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to as "the basis of all the American statutes on the subject" (2 Kent, *Commentaries on American Law* (14th ed. 1896), p. 28).

[18] Typical of the statutes in this category is that of Michigan (Compiled Laws, 1929, § 15206), which provides:

"Every person committed, detained, confined or restrained of his liberty *within this state*, for any criminal or supposed criminal matter, or under any pretense whatsoever, • • •

or in that defining the jurisdiction of the courts and judges empowered to grant it: [19]

Alabama:	Code, 1940, Tit. 15, § 1
Alaska:	Compiled Laws, 1949, § 66-26-1 (see also § 66-26-32)
Arizona:	Revised Stats., 1913 (Penal Code), Tit. 23, § 1347
Colorado:	Stats. Ann., 1935, c. 77, § 20 (see also §§ 4, 14)
Connecticut:	General Stats., 1949, § 8202
Georgia:	Code, 1933, § 50-103
Idaho:	Code Ann., 1947, § 19-4203
Illinois:	Revised Stats., 1945, c. 65, § 2
Indiana:	Burns' Stats. Ann., 1933, § 3-1905
Louisiana:	Code of Practice (Dart ed. 1942), Art. 792
Maine:	Revised Stats., 1944, c. 113, § 6
Maryland:	Flack's Ann. Code, 1939, Art. 42, §§ 1, 3
Massachusetts:	Ann. Laws, 1933, c. 248, § 2
Michigan:	Compiled Laws, 1929, § 15206 (see also §§ 15208, 15215)
Minnesota:	Stats., 1941, § 589.02
Mississippi:	Code Ann., 1942, § 2819
Missouri:	Revised Stats., 1939, § 1590 (see also § 1639)
Montana:	Revised Codes, 1947, § 94-101-3 (see also § 94-101-25)
Nebraska:	Revised Stats., 1943, § 29-2801 (cf. § 29-2812)
New Jersey:	Revised Stats., 1937, § 2:82-12 (see also §§ 2:82-3, 2:82-9, 2:82-14)
New Mexico:	Stats. Ann., 1941, § 25-1103
New York:	Civil Practice Act, 1937, § 1230 (see also § 1232)
North Carolina:	Code, 1939, § 2205 (see also § 2210)
North Dakota:	Revised Code, 1943, § 32-2204 (see also §§ 32-2229, 32-2238)
Oregon:	Compiled Laws Ann., 1940, § 11-401 (see also §§ 11-429, 11-442)
Pennsylvania:	Purdon's Stats. Ann. (Perm. ed.), Tit. 12, § 1871
Vermont:	Pub. Laws, 1933, § 2026 (see also § 2045)
West Virginia:	Code, 1943, §§ 5324, 5325
Wisconsin:	Stats., 1947, § 292.03 (see also §§ 292.05, 292.33)

In other states, while the statutory sections creating the right to the writ and defining generally the jurisdiction of the courts empowered to grant it do not expressly condition the power to issue the writ on the physical presence of the applicant

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may prosecute a writ of habeas corpus * * * to inquire into the cause of such imprisonment or restraint" [italics added].

[19] A typical statute in this category is that of Indiana (Burns' Stats. Ann., 1933, § 3-1905), which provides:

"Writs of habeas corpus may be granted by the circuit or superior courts of *the county in which the person applying therefor may be restrained of his or her liberty*, or by the judges of said courts, whether in term or vacation; * * *" [italics added].

within the territorial confines of the state (or lesser political or judicial subdivision), this condition is clearly implied from the language of a special section (common also to many of the states in the foregoing list) requiring courts and judges, upon learning from judicial proceedings before them that a person is probably illegally confined "within their jurisdiction," to issue a writ of habeas corpus for his relief without the necessity of a petition therefor:[20]

Arkansas:	Stats., 1947, § 34-1742
Iowa:	Code, 1946, § 663.11
Tennessee:	Williams' Code Ann., 1934, § 9680 (see also §§ 9684; 9705)
Texas:	Code of Crim. Procedure, 1925, Art. 128 (see also Arts. 120, 121, 129)
Utah:	Code Ann., 1943, § 104-65-10 (see also §§ 104-65-14, 104-65-23)
Wyoming:	Compiled Stats., 1945, § 3-6510 (see also §§ 3-6503, 3-6504, 3-6514).

In the following jurisdictions, the requirement that the person detained be within the jurisdiction is implied from the provision (common also to many of the states in the two preceding lists) calling for summary seizure of the prisoner by warrant and bringing him before the court whenever it appears to the court that there is cause to believe he

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[20] A typical statute of this type is that of Iowa (Code, 1946, § 663.11), which provides:

"When any court or judge authorized to grant the writ has evidence, from a judicial proceeding before him, that any person within the jurisdiction of such court or officer is illegally imprisoned or restrained of his liberty, such court or judge shall issue the writ or cause it to be issued, on its or his own motion"

will be removed from the jurisdiction before he can be relieved by a writ of habeas corpus: [21]

California:	Penal Code, 1949, § 1497
Hawaii:	Revised Laws, 1945, § 10365
Kansas:	General Stats., 1935, § 60-2218
Nevada:	Compiled Laws, 1929, § 11404
Oklahoma:	Stats., 1941, Tit. 12, § 1348
Porto Rico:	Code of Crim. Procedure, 1935, § 492
Washington:	Remington's Revised Stats. Ann., 1931, § 1080

Certain states make it a punishable offense for anyone having in his custody a person for whose relief a writ of habeas corpus has been issued to remove such person from the jurisdiction of the court issuing the writ with the intent to "avoid the effect thereof." [22] This would seem to indicate implicit recognition that removal of the prisoner beyond the territorial jurisdiction of the court issuing the writ (before service thereof) would oper-

[21] A typical statute of this type is that of California (Penal Code, 1949, § 1497), which provides:

"When it appears to any court, or judge, authorized by law to issue the writ of habeas corpus, that anyone is illegally held in custody, confinement, or restraint, and that there is reason to believe that such person will be carried out of the jurisdiction of the court or judge before whom the application is made, or will suffer some irreparable injury before compliance with the writ of habeas corpus can be enforced, such court or judge may cause a warrant to be issued, reciting the facts, and directed to the sheriff, coroner, or constable of the county, commanding such officer to take such person thus held in custody, confinement, or restraint, and forthwith bring him before such court or judge, to be dealt with according to law."

[22] For example, it is provided by Nevada Compiled Laws, 1929, § 11412, that "Any person having in his custody or under his restraint or power any person for whose relief a writ of habeas corpus shall have been duly issued * * *, who, with the intent to elude the service of such writ, or to avoid the effect thereof, * * * shall remove him or her without the jurisdiction of such judge, shall be deemed guilty of a misdemeanor, and fined in a sum not exceeding five thousand dollars."

ate to defeat the court's jurisdiction. The following states have such laws; the list is not exhaustive, and some of the states listed appear in one of the previous lists:

California:	Penal Code, 1949, § 364
Colorado:	Stats. Ann., 1935, c. 77, § 14
Idaho:	Code Ann., 1947, § 19-4236
Illinois:	Revised Stats., 1945, c. 65, § 30
Nevada:	Compiled Laws, 1929, § 11412
Ohio:	Throckmorton's Code Ann., 1940, §§ 12185-12186 (see also § 12163)
South Dakota:	Code, 1939, § 37.9905
Tennessee:	Williams Code Ann., 1934 § 9705

In Delaware (Revised Code, 1935, § 4932) and Florida (Stats., 1941, § 79.03), the statutory provisions dealing with the manner of serving the writ similarly indicate implicit recognition of physical presence of the person detained within the state as a jurisdictional prerequisite to issuance of the writ.

Only in the following states do the habeas corpus statutes lack *particular* provisions from which can be inferred recognition of the prisoner's presence in the state as a condition of the courts' power to compel production of the body by the writ; even in these states, however, there is no affirmative statutory indication that such presence is not required; on the contrary, the statutory provisions *as a whole* reflect the contrary attitude, in consonance with that of the other states:

Kentucky:	see Carroll's Codes (Russell's Revision, 1948), Crim. Code, §§ 399-429
New Hampshire:	see Revised Laws, 1942, c. 406, §§ 1-32
Rhode Island:	see General Laws, 1938, c. 584, §§ 1-31
South Carolina:	see Code of Laws, 1942, §§ 1047-1066
Virginia:	see Code, 1950, §§ 8-596-8-609

It is true, of course, that prisoners held under the authority of a state (or territorial) government are

usually if not invariably detained within the borders of the particular state; and that, on the other hand, substantial numbers of the prisoners detained under the authority of the United States, as a result of the recent global war and the far-flung American military occupation of foreign areas, are confined abroad, beyond the jurisdictional limits of the federal courts having habeas corpus jurisdiction. Consequently, the states, as distinguished from the United States, have seldom, if ever, been confronted with the precise jurisdictional problem presented by this case. We recognize the force of these considerations, but we believe, nevertheless, that the universality of the states' conception of the writ as inherently containing the jurisdictional limitation for which we contend demonstrates that this limitation was embodied in the writ as inherited from the common law. In these circumstances, it would require very clear and persuasive evidence to show that Congress, in enacting the federal habeas corpus statutes, intended to eliminate the limitation in question and thereby make the writ perform a broader function.

It may be that it would be the part of wisdom and consonant with present-day conceptions to expand the traditional scope of the writ so as to make it serve to test, in American civil courts, the legality of detentions occurring anywhere in the world, provided the detention is by the authority of

the United States, or its military or civilian officers. We submit, however, that if the traditional scope of, and jurisdictional limitations upon, the writ are thus to be expanded, it should be done, not by judicial construction, but by congressional enlargement of the writ in the light of modern conditions.[23]

It is also true that, despite the explicit or implicit jurisdictional qualification of the writ in state statutes, limiting its scope to cases where the applicant is detained within state borders, there have been decisions creating apparent exceptions to this general principle in a particular type of habeas corpus proceeding. In proceedings involving disputes between parents concerning the custody of a minor child, some states have adopted the view that the child's absence from the jurisdiction does not defeat jurisdiction to test the legality of a particular parent's custody, provided the parent exercising custody is within reach of the issuing court's processes. *Rivers* v. *Mitchell*, 57 Iowa 193

[23] Congress could, for instance, spread the burden of considering habeas corpus petitions emanating from overseas among the federal districts, or create a new court or courts for this purpose if in its judgment such action was warranted, a matter obviously beyond the capacity of this Court. (See Wolfson, *Americans Abroad and Habeas Corpus*, 9 Fed. Bar Journ. 142, 150-152; for a proposed remedial statute; and see pp. 58-59, 70-71, 77, *infra*, for a further discussion of congressional action as a possible solution to the problems presented by this case.) For our answer to the view of the court below that a proper interpretation of the Constitution, and particularly the constitutional prohibition against suspending the writ of habeas corpus, makes for present jurisdiction in the District Court for the District of Columbia, see pp. 59-77, *infra*.

(1881); *Breene* v. *Breene*, 51 Colo. 342, 345-346 (1911); *Shaw* v. *Shaw*, 114 S. C. 300 (1920); cf. *People ex rel. Billotti* v. *New York Juvenile Asylum*, 57 App. Div. (N. Y.) 383 (1901); and see *In the Matter of Jackson*, 15 Mich. 417 (1867), where the judges of the Supreme Court of Michigan were equally divided on the question. We believe, however, that cases of this type are *sui generis*, and not authority for the proposition that in the ordinary habeas corpus case, where the applicant for the writ is a mature adult personally challenging the legality of his confinement by another, the former's absence from the jurisdiction of the court is not a jurisdictional defect. As the Iowa Supreme Court pertinently observed in the *Rivers* case, *supra*, 57 Iowa at 195:

> * * * These contests between husbands and wives, who are living separate and apart from each other, as to the custody of their minor children are peculiar. Although denominated proceedings in *habeas corpus*, they are unlike the ordinary proceedings for the release of a party held upon a criminal charge. Although the minor child is denominated as the applicant for the writ, no contest is made by him. It is really a controversy between the father and mother, and the question for the court to determine is, which of the contestants is the more suitable person to have the control and custody of the child. * * *

See also Wolfson, *Americans Abroad and Habeas Corpus*, 9 Fed. Bar Journ. 142, 148.

D. *The territorial reach of the writ at common law; the English Habeas Corpus Acts; modern English decisions.*—Inquiry into the question of the territorial reach of the writ of habeas corpus at common law for light on the jurisdictional issue before the Court is justified by the familiar principle that—though the common law may not be invoked to enlarge or contract jurisdiction, rights, or remedies created and defined by statute—it is nevertheless permissible to look to that law for the meaning of common-law terms used in a statute, and for assistance in determining the scope and incidents of writs provided for by statute under their common-law names in cases where the statute itself does not plainly and unequivocally settle such questions. "Habeas corpus" is, of course, such a term and such a writ. *McNally* v. *Hill*, 293 U. S. 131, 136; *Ex parte Bollman*, 4 Cranch 75, 93-94; *Ex parte Watkins*, 3 Pet. 193, 201-202; *Ex parte Randolph*, 2 Brock. 447, 20 Fed. Cas. 242, 253 (C. C. D. Va.); Church, *The Writ of Habeas Corpus* (2d ed. 1893), § 76.

While the early common-law decisions dealing with the territorial reach of the writ shed no light on the precise jurisdictional question before the Court—the point seemingly never having arisen in England until relatively modern times—the cele-

brated Habeas Corpus Act of 31 Car. II, c. 2 (1679) offers a more fruitful source of inquiry. This Act, having been enacted long prior to the adoption of the American Constitution, may perhaps be now considered of sufficient antiquity to be treated in this country, for practical purposes, as part of the common law itself. In addition, there are a number of modern English decisions which, though providing no final and satisfactory English answer to the question posed at bar, nevertheless require consideration in any full inquiry into precedents on the issue before the Court. The following survey of the development of the law of habeas corpus in England, viewed from the particular standpoint of the jurisdictional issue here presented for determination, is accordingly presented for the Court's consideration.

1. At common law, jurisdiction to issue the writ of habeas corpus was exercised by the Courts of King's Bench, Chancery, and Common Pleas, and, "in a case of privilege," by the Court of Exchequer.[24] 9 Halsbury's *Laws of England* (2d ed.), p. 706. These were, of course, superior courts whose jurisdiction extended throughout England, and hence were more analogous in this respect to the superior courts of the American states than to

[24] This jurisdiction is now exercised by the King's Bench Division and the judges of the High Court of Justice, by virtue of the Supreme Court of Judicature (Consolidation) Act of 1925. 9 Halsbury, *op. cit. supra*, p. 706, and note (s).

the district courts in the federal system, whose territorial jurisdictions, fixed by arbitrary geographic lines, do not extend throughout the nation. The writ ran throughout England proper ("the King's realm") as well as to all the dominions of the Crown.[25] Church, *The Writ of Habeas Corpus* (2d ed. 1893), § 107. Thus it was early established that the writ would issue to any of the so-called Cinque Ports,[26] to the Counties Palatine,[27] to the Channel Islands, Jersey and Guernsey,[28] to Ire-

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[25] With the exception, however, of Scotland. This exception arose, it seems, from a historical accident, explained in 9 Halsbury, *op. cit. supra*, p. 709, and note (i), as follows: "The writ of *habeas corpus* does not run in Scotland. * * * Until the accession of James I. in 1603, when the Crowns of England and Scotland were united, Scotland was regarded by the common law as a foreign dominion to which the prerogative writs would not lie, and the writ of *habeas corpus* is unknown to the law of Scotland."

[26] *Richard Bourn's Case* (K.B., 1619), Cro. Jaq. 543, 79 Eng. Reprint 465. The Cinque Ports were five seaport towns on the coast of Kent and Sussex (Dover, Sandwich, Romney, Hastings, and Hythe), to which, in return for special sea service in defense of the coast, special jurisdictional privileges and exemptions were granted in the early days of English history. See "Cinque Ports," *Encyclopedia Britannica.*

[27] *Jobson's Case* (K.B., 1626), Latch 160, 82 Eng. Reprint 325; *Rex* v. *Pell and Offly* (K.B., 1674), 3 Keble 279, 84 Eng. Reprint 720. The English Counties Palatine (Lancashire, Cheshire, and Durham) were counties in which the earls, or counts, who ruled them in early English history had certain royal powers and prerogatives with exclusive civil and criminal jurisdiction. See "County Palatine," 4 *Encyclopedia of the Laws of England* (3d ed.) 230.

[28] *Rex* v. *Salmon* (K.B. 1669), 2 Keble 450, 84 Eng. Reprint 282; and see *Carus Wilson's Case* (1845), 7 Q.B. 984, 115 Eng. Reprint 759; *In re Frederick Belson* (Privy Council, 1850), 7 Moore 114, 13 Eng. Reprint 823; *Dodd's Case* (Chancery, 1857), 2 DeG. & J. 510, 44 Eng. Reprint 1087.

land,[29] and to Calais when it belonged to England.[30]

In 1759, Lord Mansfield, in a much-quoted *dictum* in *Rex* v. *Cowle* (K.B.), 2 Burr. 834, 855-856, 97 Eng. Reprint 587, 599-600,[31] summarized the places within the territorial reach of the writ of habeas corpus and other prerogative writs at common law as follows:

> Writs, not ministerially directed, (sometimes called prerogative writs, because they are supposed to issue on the part of the King,) such as writs of mandamus, prohibition, habeas corpus, certiorari, are restrained by no clause in the constitution given to Berwick: upon a proper case, they may issue to every dominion of the Crown of England.
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> * * * * *
>
> To foreign dominions, which belong to a prince who succeeds to the throne of England, this Court has no power to send any writ of any kind. We cannot send a habeas corpus to Scotland, or to the electorate: but to Ireland, the Isle of Man, the plantations, and, as since the loss of the Dutchy of Normandy, they

[29] *Anonymus* (K.B., 1681), 1 Ventris 357, 86 Eng. Reprint 230.

[30] See *Richard Bourn's Case*, *supra*, note 26; *Anonymus*, *supra*, note 29; *Rex* v. *Cowle* (K.B., 1759), 2 Burr. 834, 856, 97 Eng. Reprint 587, 600.

[31] The issue in the *Cowle* case was whether the Court of King's Bench had jurisdiction to issue a writ of certiorari to Berwick-upon-Tweed, a town on the English-Scotch border which seems originally to have been part of Scotland and hence exempt from the processes of the English courts. See footnote 25, *supra*, p. 35.

have been considered as annexed to the Crown, in some respects, to Guernsey and Jersey, we may; and formerly, it lay to Calais; which was a conquest, and yielded to the Crown of England by the treaty of Bretigny.

2. In his *History of English Law* (vol. 9, p. 116), Holdsworth reports that, prior to the passage of the Habeas Corpus Act of 1679, it was a common abuse for jailers to "move the prisoner about to evade service of these writs, and, in the last resort, remove him out of the jurisdiction of the court." It became evident that legislation was needed "to prevent the transportation of prisoners beyond the seas, or out of the jurisdiction of the English courts," with resulting defeat of habeas corpus jurisdiction, and between 1668 and 1679 there were a number of abortive attempts to pass such legislation. *Id.*, at p. 117. But, significantly, when these efforts finally reached fruition in the famous Habeas Corpus Act of 1679 (31 Car. II, c. 2), the remedy adopted to prevent such illegal imprisonments "beyond the seas" was not expansion of the jurisdiction of the courts so as to place such persons within reach of the courts' processes, but rather the enactment of stringent sanctions, including the conferring of actions in damages for "false imprisonment" upon the prisoners so removed, provision for forfeiture of office by offending jailers, rendering them ineligible for parc n for such offenses, and the like.

Section XI of the Act defined the territorial reach of the writ as follows:

> A habeas corpus, according to the true intent and meaning of this act, may be directed and run into any county palatine, the Cinque Ports, or other privileged places within the kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed, and the islands of Jersey or Guernsey; any law or usage to the contrary notwithstanding.

Section XII contained the sanctions directed against the removal of prisoners to distant parts. It proscribed the transportation for imprisonment purposes of any "subject of this realm, that now is or hereafter shall be an inhabitant or resident of this kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed" to "Scotland, Ireland, Jersey, Guernsey, Tangier, or into parts, garrisons, islands, or places beyond the seas, which are or at any time hereafter shall be within or without the dominions of his majesty, his heirs or successors." The section guaranteed to any subject "so imprisoned" an action for "false imprisonment in any of his majesty's courts of record, against the person or persons by whom he or she shall be so committed, detained, imprisoned, sent prisoner, or transported," with the right "to recover his treble costs, besides damages, which damages so to be given shall not be less than five hundred pounds." In

addition, it provided that any person who so transported a prisoner-subject, and any one abetting such person, upon conviction, "shall be disabled from thenceforth to bear any office of trust or profit within the said realm of England * * *; shall incur and sustain [certain designated] pains, penalties, and forfeitures * * *; and be incapable of any pardon from the king, his heirs or successors, of the said forfeitures, losses, or disabilities, or any of them."

The severity of the sanctions thus decreed by Parliament for transporting imprisoned British subjects out of England and beyond the seas is legislative recognition that such removals defeated the jurisdiction of the English courts to order production of the bodies of the prisoners thus removed and to inquire into the legality of their imprisonment by habeas corpus. For if the courts' powers were in no way infringed by the device of removal—if they could still inquire into the causes of imprisonment by issuing writs directed to responsible officials of the government residing in England—it is difficult to understand why it was thought so necessary to provide for the punishment of unauthorized removal of prisoners in such vehement terms.

3. Though the 1679 Act cured many of the defects in habeas corpus practice that had led to its enactment, and corrected many of the abuses which had prevailed at common law, it was found to be

by no means a complete answer to the problem of relieving illegal detentions. This was principally because the availability of the writ under the Act was limited to cases in which the detention grew out of "criminal or supposed criminal matters" (Sections I, II, and III), and, even in such cases, commitments "for treason or felony, plainly and especially expressed in the warrant of commitment" could not be inquired into under the writ (Section II). In consequence, the statutory writ could be resorted to only for the limited purpose of testing the legality of commitments for criminal misdemeanors; detentions under civil process and private detentions without any legal process were beyond its scope.[32] See *Carus Wilson's Case*

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[32] The Habeas Corpus Act of 1816 (56 Geo. III, c. 100) dealt with detentions, and remedies therefor, that were private in nature, being pursuant to no legal process whatever, civil or criminal. See *Carus Wilson's Case, supra*, 7 Q.B. at 1009-1010, 115 Eng. Reprint at 770. Section I of the 1816 Act provided that "* * * whereas the Provisions [of the 1679 Act, *supra*] * * * only extend to cases of Commitment or Detainer for criminal or supposed criminal matter; Be it therefore enacted * * * That *where any Person shall be confined or restrained of his or her Liberty* (otherwise than for some criminal or supposed criminal matter, and except Persons imprisoned for Debt or by Process in any civil Suit) *within that Part of Great Britain called England, Dominion of Wales, or Town of Berwick upon Tweed, or the Isles of Jersey, Guernsey, or Man,* * * [*or*] *in Ireland,* [such confined person may apply to certain designated judges for] a Writ of *Habeas Corpus ad subjiciendum* * * * to be directed to the Person or Persons in whose Custody or Power the Party so confined or restrained shall be * * *" [italics added].

The italicized words clearly indicate an intent to limit jurisdiction to issue the writ under this Act to cases where the person detained is physically confined within the designated

(1845), *supra*, 7 Q.B. at 1009-1010, 115 Eng. Reprint at 770. For this reason, the English courts found it continuously necessary, or expedient, even after the passage of the 1679 Act, to invoke their common-law jurisdiction, which was not thus circumscribed. See *Cæsar Wilson's Case*, *supra*, 7 Q. B. at 1009-1010, 1011, 1012, 115 Eng. Reprint at 770; *In the Matter of John Crawford* (1849), 13 Q. B. 613, 625-626, 630, 116 Eng. Reprint 1397, 1402, 1403-1404; *In re Frederick Belson* (Privy Council, 1850), 7 Moore 114, 13 Eng. Reprint 823; *Ex parte Anderson* (Q. B., 1861)), 3 El. & El. 487, 494, 121 Eng. Reprint 525, 527-528.[33] And since the common-law jurisdiction to issue writs of habeas

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areas. This intent is emphasized by Section V of the Act, which provides that "* * * a Writ of Habeas Corpus, according to the true Intent and Meaning of this Act, may be directed and run into any County Palatine or Cinque-Port, or any other privileged Place within that Part of Great Britain called England, Dominion of Wales and Town of Berwick upon Tweed, and the Isles of Jersey, Guernsey and Man, respectively; and also into any Port, Harbour, Road, Creek or Bay upon the Coast of England or Wales, although the same should lie out of the Body of any County; and if such Writ shall issue in Ireland, the same may be directed and run into any Port, Harbour, Road, Creek or Bay, although the same should not be in the Body of any County; * * *."

From the viewpoint of the declared reach of the writ, the 1816 Act is identical with the 1679 Act, except that Ireland and the Isle of Man were added by the later Act to the list of places, as enumerated in the earlier statute, to which the writ might issue. See *supra*, p. 38.

[33] Hence, despite the encomiums which have been heaped upon the 1679 Act, and the fact that it is the prototype of all American habeas corpus statutes (see p. 24, *supra*, and footnote 17), we are told by Lord Halsbury that "The writ in modern times is almost invariably issued by virtue of the common law jurisdiction, and not under the statute" (9 *Laws of England* (2d ed.), p. 707, note (h)).

corpus extended, as we have seen (*supra*, pp. 34-37), to all the King's dominions, the English superior courts in modern times have issued, or considered that they have power to issue, writs of habeas corpus to test the legality of restraints of liberty occurring in any dominion of the Crown, without regard to the particular localities specified in the 1679 Act.[34]

Thus, in 1861, in the celebrated case of *Ex parte Anderson*, 3 El. & El. 487, 121 Eng. Reprint 525, the Court of King's Bench held that it had power to issue a writ of habeas corpus to inquire into the validity of the detention of a British subject in the British province of Upper Canada.[35] The court observed in its opinion (3 El. & El. at 494, 121 Eng. Reprint at 527-528) that—

> * * * in establishing a local judicature in Canada, our Legislature has not gone so far as expressly to abrogate the right of the superior Courts at Westminster to issue the writ of habeas corpus to that province; which writ, in the absence of any prohibitive enactment, goes to all parts of the Queen's dominions

[34] Or in the 1816 Act, which dealt with private detentions. See footnote 32, *supra*, pp. 40-41.

[35] Anderson claimed in his petition for the writ that he was imprisoned in Toronto without having been sentenced for or charged with the commission of any offense. The respondents were the sheriffs of York and Brant Counties, the keepers of the Toronto and Brantford (Brant County) jails, and "all other sheriffs, gaolers, and all constables and others in the said province, having the custody or control of the said John Anderson."

> * * * wherever a subject of the Crown is illegally imprisoned or kept in custody.[36]

The *Anderson* decision was, however, promptly nullified as a precedent by the Habeas Corpus Act of 1862 (25 & 26 Vict., c. 20), which provides:[37]

> Sec. 1. No Writ of Habeas Corpus shall issue out of England, by Authority of any Judge or Court of Justice therein, into any Colony or Foreign Dominion of the Crown where Her Majesty has a lawfully established Court or Courts of Justice having Authority to grant and issue the said Writ, and to ensure the due Execution thereof throughout such Colony or Dominion.
>
> Sec. 2. Provided, That nothing in this Act contained shall affect or interfere with any Right of Appeal to Her Majesty in Council now by Law existing.

Fifty years later, the English courts were confronted with the question, among others, of whether

[36] The court cited as authority for this conclusion various *dicta* of Coke, Lord Mansfield, Blackstone, and Bacon, and "precedents of the issue of the writ, in very modern times, into the Islands of Man, Jersey, and St. Helena." For the circumstances under which a writ of habeas corpus, as ancillary to a writ of error, was, despite grave doubts expressed as to the court's jurisdiction to do so, issued to the Island of St. Helena, see *Ex parte Lees* (K.B., 1860), El. Bl. & El. 828, 120 Eng. Reprint 748, and the remarks of the judges during oral argument on the *Anderson* case with reference to the *Lees* case (3 El. & El. at 492-493, 121 Eng. Reprint at 527).

[37] See the editorial note to the *Anderson* decision in the English Reprint (vol. 121, p. 525), explaining that the 1862 Act was enacted "[i]n consequence of the decision in this case."

the British Protectorate of Bechuanaland, in South Africa, was a "foreign dominion of the Crown, &c.," within the meaning of the above-quoted Act of 1862. *Rex v. Earl of Crewe* (Court of Appeal), [1910] 2 K. B. 576, 102 Law Times Rep. 760. The applicant for the writ was Sekgome Letsholathibe, a pretender to the chieftainship of the Batawana tribe in the Bechuanaland Protectorate. The respondent, the Earl of Crewe, was the British Secretary of State for the Colonies. In order to prevent the outbreak of tribal warfare between the supporters and the opponents of Sekgome's claims to the tribal chieftainship, Sekgome was confined under the authority of a proclamation of the British High Commissioner in Bechuanaland.[38] The King's Bench Division of the High Court of Justice (Lord Alverstone, C. J., and Ridley and Darling, JJ.) discharged a rule to show cause why the writ should not issue, on the grounds (1) that the Bechuanaland Protectorate was a "foreign dominion of the Crown, &c." within the meaning of the 1862 Act, *supra*, forbidding issuance of the writ out of England into any such dominion, and (2) that in any event Lord Crewe, the Colonial Secretary, was not a proper respondent since he did not have custody or control of Sekgome; no

[38] The High Commissioner had issued his proclamation under the authority of an Order in Council, which in turn rested on the authority of the Foreign Jurisdiction Act of 1890 (53 & 54 Vict., c. 37). The merits of the controversy whether or not the proclamation was valid have no relevance here.

opinion was expressed as to the validity of the High Commissioner's proclamation under which Sekgome was imprisoned (102 Law Times Rep. at 766-770).

On appeal by Sekgome to the Court of Appeal (Vaughan Williams, Farwell, and Kennedy, L. JJ.), the appeal was dismissed. The principal ground of dismissal was the Court of Appeal's conclusion that the High Commissioner's proclamation (and, consequently Sekgome's confinement) was valid—this being the issue on the merits which the King's Bench Division had refrained from deciding (*id.* at 770-784). Kennedy, L. J., however, also expressly concurred in the lower court's view that "the Secretary of State for the Colonies is not a person to whom such a writ can properly be directed," and stated that the writ should have been directed either to the actual custodian or to the latter's immediate "administrative superior," *i. e.*, the High Commissioner (*id.* at 784).[39] Lord Justice Kennedy further expressed the conviction that no English court had, in any event, jurisdiction to issue a writ of habeas corpus under the cir-

[39] Vaughan Williams, L. J. was likewise "inclined to think" that the writ "could not be properly addressed to the Secretary of State" (though he found it unnecessary, he said, to decide the point), and agreed that it should more properly have been directed either to the actual jailer or to his immediate superior (the High Commissioner), or to both (*id.* at 772). Farwell, L. J. stated that he "should be slow to conclude" that the Colonial Secretary was not a proper respondent, but likewise found it unnecessary to decide the point (*id.* at 780).

cumstances of that case because the Bechuanaland Protectorate, where the prisoner was confined, was "foreign territory," and not a "foreign dominion" of the King. His views in this respect are particularly pertinent to the issue in the case at bar. He said (*id.* at 782-783):

> * * * par[agraph] 4 [of Lord Crewe's affidavit in opposition to the issuance of the writ] runs thus: "The Bechuanaland Protectorate is a foreign country within which His Majesty has power and jurisdiction by treaty, grant, usage, sufferance, or other lawful means within the meaning of the Foreign Jurisdiction Act 1890. The territory of the said protectorate is foreign territory under His Majesty's protection. It has never been acquired by settlement or ceded to or conquered or annexed by His Majesty or any of his royal predecessors, nor has His Majesty or any of his royal predecessors recognized the same as nor is it part of his dominions, but he has power and jurisdiction within the same." *If this be the true view, as, in my opinion, we ought to hold, and the Bechuanaland Protectorate * * * forms no part of His Majesty's dominions, there is no authority, so far as I am aware, which would justify the issue of the writ of habeas corpus for which the appellant asks.* [Italics added.]

These views provide persuasive support, we think, for the Government's contention in the case at bar. There would seem to be a clear analogy between

the British Protectorate of Bechuanaland in 1910 and its relationship to the British Government, on the one hand, and the American occupation zone in present-day Germany and its relationship to the United States Government, on the other. Just as Bechuanaland was "foreign territory," though "under His Majesty's protection," so the American occupation zone in Germany is "foreign territory," though under American protection. Cf. *Neely* v. *Henkel*, 180 U. S. 109, 115-119 (American-occupied Cuba held a "foreign country or territory"); and see Fairman, *Some New Problems of the Constitution Following the Flag* (1949) 1 Stanford L. Rev. 587, 624-626. See *infra*, pp. 65-66, 75-77. And the analogy between the British Colonial Secretary's relationship to the prisoner Sekgome and the Secretary of Defense's relationship to the respondents in the instant case is equally apparent. See *infra*, pp. 50-53. For the same reasons, therefore, which led Lord Justice Kennedy, of the English Court of Appeal, to conclude that there was a lack of power in the King's Bench Division of the High Court to inquire by habeas corpus into the legality of Sekgome's detention in foreign territory (though at the hands of British officials acting under British authority), we submit that the District Court for the District of Columbia properly determined in this case that it lacked power to inquire by habeas corpus into the legality of respondents' detention in foreign territory.

A more recent English decision having relevance to the issue at bar is that of *In re Ning Yi-Ching and Others* (Vacation Court, 1939), 56 Times Law Rep. 3. There, four Chinese aliens, detained by British authorities in Tientsin, China, applied to Judge Cassels in Vacation Court for a writ of habeas corpus, directed to the British Foreign Secretary (Lord Halifax), the British Consul-General in Tientsin, and other British officials in that city, to inquire into the validity of their detention. Britain at that time exercised certain rights of administration and control in Tientsin by virtue of a lease which it had acquired by treaty with China. The Chinese prisoners were held on charges of certain criminal offenses, and the British authorities had evidenced the intention of surrendering them to the Tientsin District Court (a Chinese court), which the applicants for the writ alleged was then in control of the Japanese, who were engaged in military operations in the vicinity. It was held, however, that the writ of habeas corpus could not be directed to run into foreign territory to test the legality of the restraint of an alien there detained, even though the detention was by British authority. Though eminent counsel appeared in the case on behalf of the Chinese prisoners, the reporter noted that Judge Cassels "listened in vain for a case in which the writ of *habeas corpus* had issued in respect of a foreigner detained in a part of the world which was not part of the King's

dominions or realm" (56 Times Law Rep. at 6). It was further held that, in any event, the prayed-for writ could not be directed to the British Foreign Secretary "because he was not in control of the prisoners but was only acting in an advisory capacity" (*ibid.*). The *Ning Yi-Ching* case thus provides further modern English support for the Government's contention in the case at bar.[40]

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[40] Two celebrated English cases that arose towards the end of the last century involved writs of habeas corpus directed to the head of an institution for destitute children, one Barnardo, requiring him to produce two children who had been committed to his care, and whom he had without authority delivered to strangers for adoption. *Barnardo* v. *Ford* [*Gossage's Case*] (House of Lords), [1892] A. C. 326, dismissing appeal from *The Queen* v. *Barnardo* [*Gossage's Case*] (Court of Appeal, 1890), 24 Q.B.D. 283; *The Queen* v. *Barnardo* [*Tye's Case*] (Court of Appeal, 1889), 23 Q.B.D. 305. In both cases, Barnardo had delivered the children prior to the issuance of the writs, and, as grounds for his prayer that the writs be quashed, he claimed that he no longer had custody or power of control over the children, and, in fact, that he had no knowledge of their whereabouts, other than that the would-be adopters intended to take them out of England to Canada. In both cases, the final decision was that Barnardo was required to make return to the writs so that all relevant facts could be thoroughly ascertained. The judges of the Court of Appeal and the House of Lords expressed divergent views in lengthy opinions, but their differences revolved around the question of whether the writs would lie if it was established that the respondent had in fact no power of control over the children at the time of the applications for the writs and their issuance. The judges of the Court of Appeal thought the writs would lie even in that event, unless it appeared that it would be absolutely impossible for Barnardo to locate, recover, and produce the children. A majority of the judges in the House of Lords disapproved this extreme view, stating that the writs would not lie if Barnardo could satisfactorily prove on his returns to the writs that he no longer had control over the children at the time the writs issued. However, the question of whether or not the writs would lie if the children, though subject to the respondent's control, were beyond the

II

A Writ of Habeas Corpus Cannot Properly Issue to Petitioners, Who Do Not Have Actual Physical Custody of the Respondents

A. Intertwined, of course, with the question of the jurisdiction of the district court in the case of applicants not detained within the court's territorial confines is the problem of whether governmental officials who have ultimate directive authority over the immediate jailer, as distinguished from actual physical custody, are proper respondents. The statute (28 U. S. C. 2243) provides that the writ "shall be directed to the person having custody of the person detained". In respect of a substantially similar provision in a predecessor statute (Rev. Stats. 754-758), this Court stated that Congress contemplated "a proceeding against some person who has the immediate custody of the party detained, with the power to produce the body of such party before the court or judge, that he may be liberated if no sufficient reason is shown to the contrary." *Wales* v. *Whitney*, 114 U. S. 564,

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territorial jurisdiction of the court was not considered in either case, the point not having been raised.

We think, however, for reasons previously stated (see pp. 31-32, *supra*), that, whatever might have been the views of the English judges on this question had it been raised, they would have little relevance here, since the *Barnardo* cases involved questions relating to the custody of minor children, who, though nominal parties in habeas corpus proceedings arising from such controversies, are not the true parties in interest—a factor distingishing such cases from the ordinary habeas corpus proceeding in which the applicant for the writ is, in a real sense, restrained of his liberty. See *Rivers* v. *Mitchell*, 57 Iowa 193, 195, quoted *supra* at p. 32.

574. Certainly, the Secretary of Defense, the Secretary of the Army, and the other officials who were named respondents in no sense have "immediate" or "actual physical" custody of the prisoners, and, under such decisions as *McGowan* v. *Moody*, 22 App. D. C. 148, 163; *Jones* v. *Biddle*, 131 F. 2d 853 (C. A. 8), certiorari denied, 318 U. S. 784; and *Sanders* v. *Bennett*, 148 F. 2d 19 (C. A. D. C.), they were improperly named respondents. (See also the views of the judges of the English courts in *Rex* v. *Earl of Crewe*, [1910] 2 K. B. 576, discussed *supra*, pp. 44-45, and footnote 39, p. 45). Although these officials may have power to effectuate a mandate which the district court might issue for the release of the prisoners, that practical consideration (which is always present when the jailer is a government official responsible to a superior official resident in the District of Columbia) does not dispel our doubts that Congress intended the writ to be issued to them. To construe the statute as permitting the habeas corpus court to direct persons without actual custody of the prisoner to produce him would be to contradict the common understanding and to disavow the traditional scope of the writ's reach.

Furthermore, once there is a departure from the accepted rule that habeas corpus must be brought against those with actual custody of the prisoner, the door is opened to suits against any superior of the actual custodian, all the way up the "chain of command"—even, perhaps, including the Presi-

dent, who is Commander-in-Chief of all military forces and the country's sole organ in the field of foreign relations. *McGowan* v. *Moody, supra,* pointed out, with respect to the Secretary of the Navy, that "The officers of the Navy are not his agents. They, like the Secretary himself, are the agents and representatives of the President of the United States, who is the Commander-in-Chief of the Army and Navy. The officers in command of the island of Guam are subject to his orders. Any authority which the Secretary may exercise over them is solely as the representative of the President, in his name, and as the organ of his will. * * * The power to relieve the prisoner, or to produce him in obedience to the writ, is in the President, and not in the Secretary of the Navy." 22 App. D.C., at 164. Thus, the consequences of abandoning the established rule are both uncharted and potentially grave, and no adequate substitute for suit against the actual custodian has been proposed.

In this connection, the recent establishment in Germany of a High Commission in lieu of the former Military Government (and the transfer of supervision from the Defense to the State Department) also has a significant impact. We do not contend, in this Court, that this change renders the present action moot, or requires new parties. But the transfer does illustrate some of the difficulties in permitting officials such as petitioners to be named as parties respondent in habeas corpus, instead of the actual custodian. In the area of for-

eign affairs, especially where military and civil officials are operating together, lines of authority and chains of command may be hard to unravel—short of the President. Also, changes in high governmental policy, or in the administration of an overseas region, may shift responsibilities of officials at the seat of government, and compel changes in defendants or the institution of an entirely new action. On the other hand, adherence to the established rule involves none of these embarrassments; the writ is directed to the person who holds the prisoner in his immediate custody and neither court nor respondent is concerned with chains of command or reallocations of ultimate responsibility.

B. It may be that this objection is one which can be waived (cf. *Ex parte Endo*, 323 U. S. 283, 305; *Ahrens* v. *Clark*, 335 U. S. 188, 193), but, if so, there has been no waiver here. The return to the rule to show cause denied that petitioners have had custody or keeping of respondents (R. 9); and in the Court of Appeals it was again urged that petitioners are not proper respondents because they do not have actual physical custody of the respondents (Brief for Appellees in the Court of Appeals, pp. 5-6).

III

The Burden Falling on the District Court for the District of Columbia Under the Decision Below Would Be So Great That It Is Highly Improbable That Congress Ever Contemplated That That Court Should Be the Forum, and Exclusive Forum, to Try Habeas Corpus Proceedings of This Type

Under the decision below, the District Court for the District of Columbia is the proper forum for

the trial of habeas corpus proceedings emanating from any place in the world beyond the territorial confines of all federal district courts, provided the applicant for the writ is detained by American officials purporting to act in their official capacities, and makes a showing or an allegation that his detention is somehow in violation of the Constitution, or is otherwise illegal. The decision moreover holds that that court is the *only* proper forum, since that court alone has within reach of its processes those highest officers of this Government having ultimate administrative control over the lower-ranking officials who are the applicant's immediate jailers. Upon the local District Court, under this decision, must fall the task of entertaining, considering, and passing upon every such application, however lacking in merit it may finally prove to be, so long as it contains the requisite allegation of unlawful detention by an American official in foreign territory. The status of the applicant—whether he be citizen or alien, friend or foe—is immaterial. For the reasons which follow, it is submitted that the duty which would thus devolve upon the local District Court under the decision here sought to be reversed would constitute a burden so great that it is highly improbable that Congress ever contemplated such a result.

The extraordinary nature of the burden that would fall on the local District Court under the decision below is suggested by the fact that nearly

400,000 cases were tried by American Military Government Courts *alone* in the American occupation zone of Germany *alone* between September 1945 and August 1948. Noblgman, *American Military Government Courts in Germany* (1950), 267 Annals of Amer. Acad. of Pol. and Soc. Sci. 87, 95. Since that time, military government courts, or their analogues (now referred to as the courts of the High Commission), have continued to operate in Germany, as part of the control program demanded by the occupation of that enemy country.[41] When it is remembered that the above-cited figure takes no account of similar cases in Japan, or of cases before other types of American-manned tribunals (military commissions, courts-martial, etc.) in these and other countries, it is evident that the total number of applications for writs of habeas corpus which might be filed in the District Court for the District of Columbia on behalf of citizens and aliens confined abroad by American military

[41] For other relevant statistics, descriptions of the structure and jurisdiction of these military government tribunals, and for discussions of various aspects of the vast and complicated task confronting our Military Government Courts in the American occupation zone of Germany, see, in addition to the article cited, the following articles by the same author: *Military Government Courts: Law and Justice in the American Zone of Germany* (1947) 33 Am. Bar Assoc. Journ. 777; *The Administration of Justice in the United States Zone of Germany* (Oct. 1946), 8 Fed. Bar Journ. 70; *Procedure and Evidence in American Military Government Courts in the United States Zone of Germany* (Jan. 1947), 8 *id.* 212; see also Fairman *Some New Problems of the Constitution Following the Flag* (1949), 1 Stanford L. Rev. 587, 606-611, 616-618.

or civilian authorities,[41a] and which that court would be required to entertain and pass upon under the decision below, is potentially enormous.[42]

Many, if not most, of these applications could be expected to present difficult problems of jurisdiction and possibly delicate questions of international

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[41a] Approximately, 8,000 persons are detained at the present time in American-occupied Germany, Austria, and Japan, as a result of convictions by courts-martial, military commissions, war crimes tribunals, and American-manned occupation courts. Of these, about 2500 are Americans (mostly military personnel convicted by courts-martial and given relatively short sentences; see fn. 57, *infra*, p. 75); the remainder are enemy aliens and other non-Americans.

[42] A further indication of the enormity of the task that would confront the local District Court if the decision below is sustained is the fact that in the 16-month period between January 1948 and May 1949 motions for leave to file original petitions for writs of habeas corpus were filed in this Court on behalf of over two hundred German enemy aliens alone, confined abroad by American military authorities. *Brandt* v. *United States*, and 13 companion cases, 333 U. S. 836; *In re Eichel* [one petition on behalf of three persons], 333 U. S. 865; *Everett* v. *Truman* [one petition on behalf of 74 persons], 334 U. S. 824; *In re Krautwurst*, and 11 companion cases, 334 U. S. 826; *In re Ehlen "et. al.,"* and *In re Girke "et al.,"* 334 U. S. 826; *In re Gronwald "et al.,"* 334 U. S. 857; *In re Stattman*, and 3 companion cases, 335 U. S. 805; *In re Vetter*, and 6 companion cases, 335 U. S. 841; *In re Eckstein*, 335 U. S. 851; *In re Heim*, 335 U. S. 856; *In re Dammann*, and 4 companion cases, 336 U. S. 922-923; *In re Muhlhauer*, and 57 companion cases, covering at least 80 persons, 336 U. S. 964-965. See Fairman, *Some New Problems of the Constitution Following the Flag*, 1 Stanford L. Rev. 587, 594-603, for a discussion of these cases. It would be reasonable to expect, of course, that if the decision below is upheld the floodgates would be opened wide and that what has so far been a trickle would develop into a torrent. Cf. *Dorsey* v. *Gill*, 148 F. 2d 857, 862 (C.A. D. C.), certiorari denied, 325 U. S. 890, where it was observed that "The number [of habeas corpus petitions filed in the District of Columbia] has increased most rapidly during the last three years, since the Supreme Court's decision in *Walker* v. *Johnston* * * *."

law and foreign affairs.[43] Many, drawn by inexpert hands, would be lacking in conciseness as well as appreciation of the sort of alleged error that is subject to review on habeas corpus.[44] Yet all would have to be read and processed patiently and conscientiously if the right to be heard by the local court were to be other than illusory. Some could be expected to be so lacking in merit on their face as to be deniable without further proceedings (other than appellate), but time would be required to read even these in order to ascertain that fact. Many more, doubtless, would sufficiently present a *prima facie* case calling for the writ's issuance as to require the issuance of a show-cause order, to which a return would be required, followed by a hearing on issues thus joined. In many of the

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[43] Cf. this very case (see p. 5, and footnote 4, *supra*), which there is no reason to suppose is unique or atypical.

[44] See Fairman, *op cit. supra* (notes 41-42), 1 Stanford L. Rev. 587, 603, where, in describing some of the habeas corpus petitions filed in this Court in recent terms by German aliens detained abroad, it was said:

"One can scarcely hope to put in brief compass any adequate summary of the many sorts of contentions set out in these thousands of pages. One defense counsel sent to the Court an 'opinion on the verdict' covering 104 typed pages in the translation. • • • Many of the documents run on and on without form or headings • • • Many pages devoted to the petitioner's version of factual details must remain quite incomprehensible apart from the record of the trial. As one might expect, contentions of want of jurisdiction, appeals for a new trial, assignment of error in law, and pleas for clemency are often mixed together in the applications • • • A conception that runs throughout is neatly expressed in the form of address used by one applicant: 'To the Supreme Federal Court of Justice (War Crimes Department) Washington.' • • •"

cases, the jurisdictional issues raised could not be settled without the applicants' presence at hearings to give testimony and be cross-examined. This would necessitate the transportation—over thousands of miles, oftentimes from the remotest outposts of the earth—not only of the prisoner-petitioners, but also of such persons having knowledge of disputed facts as would be required to refute baseless claims and charges that might be expected from prisoners who believed they had little to lose by the adoption of such tactics.

It is submitted that the task that would confront the local District Court under the decision below would be so formidable that Congress cannot be supposed, in the absence of statutory language of the clearest character, ever to have contemplated such a result. It is well known that the docket of the District Court is already, and has long been, clogged with domestic habeas corpus cases. See *Dorsey* v. *Gill, supra* (note 42) 148 F. 2d at 862-864. The added burden that would devolve upon that court if the decision below is sustained would clearly be immense. If it be thought that the validity of the confinement of every person—alien as well as citizen—detained by American officials in foreign lands should be subject to judicial inquiry by writ of habeas corpus, legislation equitably distributing the burden of entertaining petitions for such writs among the different judicial districts

of the United States, or setting up special courts for this purpose, is the answer to the problem."[45]

IV

Alien Enemies Confined Abroad Are Not Entitled by the Constitution to the Writ of Habeas Corpus, and There Is Therefore No Occasion to Construe the Habeas Corpus Statutes as Conferring Upon the District Court for the District of Columbia Jurisdiction to Inquire into the Legality of Their Detention

The court below stated that the answer to the question at bar—whether the District Court for the District of Columbia has jurisdiction to issue a writ of habeas corpus to inquire into the legality of the detention, by American officials, of enemy aliens confined on foreign soil—could not be determined by "casual reference to statutes or cases," but rather "stem[med] directly from fundamentals" (R. 55). The "fundamentals" which the court thought dictated an affirmative answer to this question may be briefly summarized as follows (see R. 55-61):

(1) "[A]ny person," said the court, whether he be citizen or alien, and wherever he may be, "who is deprived of his liberty by officials of the United States, acting under purported authority of that Government, and who can show that his confine-

[45] This is the conclusion reached in Wolfson, *Americans Abroad and Habeas Corpus* (Jan. 1948), 9 Fed. Bar Journ. 142, 146-149, which considers the problem solely in connection with *citizens* detained abroad. See pp. 150-152 of the article cited for the provisions of a proposed statute.

ment is in violation of a prohibition of the Constitution, has a right to the writ [of habeas corpus]" (R. 55). This followed, the court thought, from the following premises (R. 55-56): (a) The Fifth Amendment applies to "every person"; (b) action of government officials in violation of the Constitution is void; (c) a basic function of the judicial branch of a government built upon a constitution is to set aside void action by government officials—"* * * no Government action," to use the language of the court, "which is void under the Constitution is exempt from judicial power"; and (d) the writ of habeas corpus is "the established, time-honored process in our law for testing the authority of one who deprives another of his liberty."

(2) "[I]f a person has a right to a writ of habeas corpus, he cannot be deprived of the privilege by an omission in a federal jurisdictional statute" (R. 58-59). This followed, said the court, from the following premises (R. 59-60): (a) The right to habeas corpus is an "inherent common law right"; (b) "The Federal Government cannot suspend the privilege, except when, in cases of rebellion or invasion, the public safety may so require [citing Article I, § 9, cl. 2 of the Constitution, set out at p. 2, *supra*]; and (c) "Congress could not effectuate by omission that which it could not accomplish by affirmative action. So, if the existing jurisdictional act be construed to deny the writ to a person

entitled to it as a substantive right, the act would be unconstitutional."

And since, the court concluded, a person unlawfully detained abroad by American authorities has "a right to the writ," of which he "cannot be deprived * * * by an omission in a federal jurisdictional statute," his petition for the writ "will lie in the District Court which has territorial jurisdiction over the officials who have directive power over the immediate jailer" (R. 60), to wit, the District Court for the District of Columbia.

We submit, however, that the most basic of the above-listed premises, upon which the court below erected its conclusion, are far too doubtful to be capable of supporting its elaborate reasoning.

First. Granting, as the court said, that American officials are subject to the Constitution wherever they act, and that action in violation of the Constitution is void, it does not necessarily follow that a *judicial* remedy—habeas corpus where the offending official's acts have the effect of restraining personal liberty—is available to contest that action. The court's most fundamental assumption—that "[i]n our jurisprudence, no Government action which is void under the Constitution is exempt from judicial power" (R. 56)—is certainly far from a universal proposition, admitting of no exceptions. Abundant exceptions come to mind, particularly in the realm of foreign affairs and the conduct of war,

in which the Executive is the primary and often the sole guardian of the Constitution. As this Court observed in *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302: "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." Cf. *Knauff* v. *Shaughnessy*, 338 U. S. 537, 542-3; *Ludecke* v. *Watkins*, 335 U. S. 160, 169-173; *Chicago & Southern Air Lines* v. *Waterman Corp.*, 333 U. S. 103, 111-112; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 319-321.

An enemy alien held abroad may be detained because he is believed to be a war criminal, or because he is charged with an offense against the occupying forces or the rules established for the occupation and governance of his country, or because he is interfering with some phase of the prosecution of the war to a successful conclusion. But whatever the reason the American authorities overseas may have for confining him, they are acting—whether they be military or civilian officials—as the delegates and deputies of the President in the conduct, on foreign soil, of this nation's foreign affairs and the carrying-on of a foreign war. The President's authority in those spheres is an executive power for which he is normally "responsible to the Constitution" (*United States* v. *Curtiss-*

Wright Corp., 299 U. S., at 319), and not to the courts. His deputies, in turn, are responsible to him for violations of their rightful authority. And by the same principle, the detained alien must seek redress for his invaded rights through the executive and administrative machinery instituted for that purpose, as well as through the good offices of his own country's government.

Second. Equally doubtful, we think, is the view of the court below that the habeas corpus statutes —if interpreted as not vesting power in any federal district court to issue writs of habeas corpus where the alien-enemy applicants are detained beyond the territorial jurisdiction of all district courts—would violate the constitutional prohibition against suspending the privilege of the writ except when required by the public safety in cases of rebellion or invasion. We argue below (*infra*, pp. 71-77) that this clause of the Constitution does not require Congress to make habeas corpus available to American citizens held in a foreign land. Whether that be so or not, we do not believe that the provision touches the case of non-citizens detained abroad, particularly enemy aliens. With full deference to the view that the writ of habeas corpus is a basic safeguard of liberty, we gravely doubt that the Constitution's draftsmen contemplated it as a method of setting aside, through the intervention of our domestic courts, all *ultra vires* actions by government officials, military or civil, any place in the

world, even though such actions might affect only aliens or enemy aliens. The amplitude of the writ, as referred to in the Constitution, is probably no greater than it was at common law or under the English statutes at the time the Constitution was adopted (*supra*, pp. 33-34). And we have found no authority for the proposition that the writ was then available on behalf of aliens confined in a foreign country. On the contrary, such authority as exists points the other way. (See *supra*, pp. 34-49.) The Habeas Corpus Act of 1679 limited its sanctions against removal of prisoners to foreign lands to "any person or persons, *subjects of this realm*". Secs. IX, XI, XIII (italics supplied). Even alien enemies held on English soil were held "not entitled to any of the privileges of Englishmen; much less to be set at liberty on a habeas corpus." *Case of Three Spanish Sailors* (K. B. 1779), 2 Black. W. 1324, 96 Eng. Reprint 775, 776; cf. *Rex* v. *Schiever, a Swede* (K. B., 1759), 2 Burr. 765, 97 Eng. Reprint 551. And as late as 1939 there was no record in England of a case in which the writ had issued with respect to a friendly alien detained by British authority in a part of the world which was not part of the King's dominions or realm. See report of *In re Ning Yi-Ching*, 56 The Times Law Reports 3, 6 (*supra*, pp. 48-49).[46]

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[46] Even as to American citizens, *Neely* v. *Henkel*, 180 U. S. 109, 122, indicates that "the provisions of the Federal Constitution relating to the writ of *habeas corpus*" would not apply

Third. There is, moreover, no basis for holding that enemy aliens located and held in enemy territory have any substantive rights under our Constitution or laws which may be prosecuted through the writ of habeas corpus.[47] The rights of these enemy aliens all flow from and must be vindicated within the framework of the system established for the occupation of their country, and they cannot properly call upon the protections and rights stemming from our domestic or internal law, unless Congress has expressly granted such rights to them. They are foreigners in a foreign land, held in that foreign land by the sovereignty now governing it as a result of war, defeat, surrender, and occupation.

An occupying power has the sanction of the law of nations to exercise governmental powers, to promulgate regulations, and to grant rights to the inhabitants. *New Orleans* v. *Steamship Co.*, 20 Wall. 387, 393-394; *Dooley* v. *United States*, 182 U. S. 222, 230-231; *Neely* v. *Henkel*, 180 U. S. 109; *MacLeod* v. *United States*, 229 U. S. 416, 424-425. As a member of the family of nations, the United States, in its capacity as an occupying power, has this authority to its fullest extent. *United States* v. *Curtiss-*

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where the prisoner was held in American-occupied foreign territory. See *infra*, pp. 75-76.

[47] "The writ need not * * * be awarded if it appear upon the showing made by the petitioner, that if brought into court, and the cause of his commitment inquired into, he would be remanded to prison." *Ex parte Terry*, 128 U. S. 289, 301. See 28 U.S.C. 2243.

Wright Corp., 299 U. S. 304, 318. But the occupied country remains foreign territory and "cannot be regarded, in any constitutional, legal or international sense, a part of the territory of the United States." *Neely* v. *Henkel*, 180 U. S. 109, 119 (American military occupation of Cuba after the War with Spain). Similarly, the laws governing the residents of the occupied lands, and the rights accorded them by the occupying power, do not stem from the Constitution, for "the Constitution can have no operation in another country." *In re Ross*, 140 U. S. 453, 464. "Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens * * *" *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 318. On the contrary, the occupying power's rules and regulations are "the laws of a foreign country" (*Neely* v. *Henkel*, 180 U. S. 109, 122) currently promulgated for that country by its occupier, and action taken by American officials in the enemy-occupied country is "without the jurisdiction of the United States" (180 U. S., at 122). It must follow, we think, that enemy aliens in enemy lands are not subject to duties under the American Constitution and laws, and likewise cannot lay claim to rights under our law. Respondents' legal status does not differ from that of Germans now detained in Germany by German authorities. Like such prisoners, or like Englishmen in England, or Frenchmen in France, they must look to the rights and remedies open to them.

under their country's present laws and government.

Congress and the President, in carrying on activities abroad, may possess no power not derived from the Constitution and may always be subject to its applicable provisions (*Ex parte Quirin*, 317 U. S. 1, 25; cf. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 318), but it does not follow that all persons affected by their action possess rights under the Constitution, violations of which they can redress. The source of governmental authority and the right to challenge unauthorized action are separate and distinct. It is our position that, in cases such as this, non-resident alien enemies have no rights under American law, even though American officials must act under and in accordance with that law.[48]

Congress may have indicated by its legislation an intention to grant certain rights under American law to enemy aliens found on American soil (*Ex parte Quirin*, 317 U. S. 1; *In re Yamashita*, 327 U. S. 1, 9;[49] *Ludecke* v. *Watkins*, 335 U. S. 160; cf. *Ex parte Kawato*, 317 U. S. 69, esp. pp. 76-7); but this exceptional legislative solicitude should not serve as a point of departure to accord, without comparable legislative sanction, similar substantive

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[48] See *infra*, pp. 73-77, for further discussion of the extraterritorial application of the Constitution and its guarantees.

[49] At the time Generals Yamashita and Homma were tried, convicted, and held, the Philippine Islands were under American sovereignty (327 U. S., at 9-10), and the writ of certiorari could run from this Court to the Supreme Court of the Philippines.

rights under American law to enemy aliens living abroad to whom Congress has not been so generous. And there is no ground for straining to read any Congressional enactment as conferring such extra-territorial rights or privileges. On the contrary, we believe the Court should refrain from holding that such rights have been extended to non-resident alien enemies unless there is the clearest evidence that Congress (or, perhaps, the Executive) so intended. Cf. *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 357. We may add that it is highly unlikely that Congress would make available the procedural remedy of habeas corpus to alien enemies without any substantive rights to be vindicated by the writ.[50]

Fourth. Although the Court of Appeals thought that it could not distinguish between citizens and non-resident aliens (R. 58), we do not believe that this Court must necessarily reach the question of whether the writ is, and must be, available to citizens of the United States detained in a foreign country by American officials (cf. *Ex parte Betz*, and companion cases, 329 U. S. 672; *In re Bush*, 336 U. S. 971; *Bird* v. *Johnson*, 336 U. S. 950), and, if so, in what court it would lie. The distinctions have already been suggested in this Point.

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[50] On the right of non-resident alien enemies to sue in our courts—as distinguished from the source of their substantive rights or claims—see *Ex parte Colonna*, 314 U. S. 510; *Ex parte Kawato*, 317 U. S. 69; Gordon, *The Right of Alien Enemies to Sue in American Courts*, (1942) 36 Ill. L. Rev. 809, 810-811; Note: (1918) 31 Harv. L. Rev. 470.

For one thing, the right of citizens to have the writ issue on their behalf—so long, at least, as they are confined in a place which is actually subject to the control or dominion of the Government—may possibly have obtained at common law (cf. *Ex parte Anderson,* 3 El. and El. 487, 491 (Q.B., 1861) (*supra,* pp. 42-43)), and thus have been a part of the concept of habeas corpus which was carried over into the Constitution and the statutes. Certainly, Englishmen enjoyed a much higher status under the pre-Constitution English law of habeas corpus than aliens, and particularly enemy aliens. See *supra,* p. 64.[51]

Another difference, as we have suggested (*supra,* pp. 65-68), is that American citizens have substantive rights under American law which can be pressed by means of the writ, while enemy aliens living abroad have none. And in any event, it would not be antithetic to the Constitution or our history to hold that while our fundamental law may implicitly grant to American citizens a universal right of freedom from unlawful detention by Americans, it gives only a territorially limited right to aliens, whose rights in many other respects are not on a par with those of citizens. Cf. *Hines* v. *Davidowitz,* 312 U.S. 52, 69-74; *Ng Fung Ho* v. *White,*

[51] In *Re Sun-Yat* (1896), unreported, cited in Short and Mellor, *Crown Practice* (2d. ed. 1908), p. 318, and in 9 Halsbury's *Laws of England* (2d ed.), p. 710, note (t), an English court refused to issue the writ at the behest of a Chinese national (later the first President of the Chinese Republic) detained within the Chinese embassy in London.

259 U. S. 276, 284-285; *Knauff* v. *Shaughnessy*, 338 U. S. 537. Even though non-resident enemy aliens such as respondents are held to possess rights under the Constitution and laws, they can properly be required to pursue those rights through executive and administrative channels, rather than through the district courts. *Supra*, pp. 61-63.[52]

Conclusion. For present purposes, it is enough to say that Congress is not required by any specific mandate of the Constitution, or any vague emanation therefrom (cf. *Ludecke* v. *Watkins*, 335 U. S. 160, 171), to give habeas corpus rights to alien enemies outside the country. Whether, and on what conditions, Congress should extend the same rights to alien enemies outside our territory as are available to those within may depend upon such factors as the distance from this country of the foreign places of confinement, the availability of witnesses and their amenability to the processes of our courts, the expenses of transportation, the number of potential applicants for the writ, the classes of detained enemy aliens, and the extent of judicial review available abroad (see pp. 54-59, *supra*), as well as upon our agreements with other powers, the need for expedition and finality in the execution of our international undertakings in punishing war criminals, and the policy

[52] It is settled, under the existing habeas corpus statutes, that enemy aliens detained *within* the territory of the United States may resort to the district courts for writs. *Ex parte Quirin*, 317 U.S. 1; *Ludecke* v. *Watkins*, 335 U.S. 160. See *supra*, pp. 67-68.

demands of the occupation of enemy areas. Other factors to be weighed are whether the remedy shall be available at all times, even during the height of hostilities on foreign soil; the stage at which relief should be allowed, *e.g.*, before or after trial; whether special time and procedural provisions are appropriate; and the scope of review to be afforded in our domestic courts. Lastly, as we have previously suggested (*supra*, pp. 58-59, and footnote 23, p. 31), it would unquestionably be desirable, in the event Congress legislates on the matter, to distribute among several district courts the task of considering petitions for habeas corpus coming from aliens detained abroad. But these are all matters for legislative consideration—unfettered by the view of the constitutional requirement on which the decision below is based.

V

The Constitution Does Not of Its Own Force Entitle Any Person, Citizen or Alien, to the Writ of Habeas Corpus to Test the Legality of His Detention Abroad by American Officials

In Point IV (pp. 68-70), we have argued that the Court need not pass upon the constitutional right of an American detained abroad to the writ. But since the Court of Appeals did not believe that a difference could be drawn between the case of a citizen and that of a non-resident enemy alien (R. 58), it also seems appropriate to sketch the reasons for believing that the constitutional prohibition against suspension of the writ does not compel

habeas corpus to be made available to citizens held overseas by American officials.[53]

1. The wording of Article I, Section 9, Clause 2,[54] strongly implies that the protected privilege was solely that known to English and colonial practice before the Revolution. For a privilege or right cannot be "suspended" unless it already has existence, and this language itself shows that the framers were intent on preserving the writ as they knew it, rather than on enlarging its coverage. Cf. *Ex parte Watkins,* 3 Pet. 193, 201. And, as we have pointed out (*supra,* pp. 33-42), the pre-Revolutionary history of habeas corpus in England hardly can be cited in support of the view that the writ would run to English officials imprisoning English subjects on non-English soil. In particular, the framework and provisions of the Habeas Corpus Act of 1679—with its special sanctions against removal of prisoners to foreign parts—are very difficult to harmonize with the claimed extra-territorial reach of the writ under the old English practice. *Supra,* pp. 37-39. Unless this preexisting universal scope can be shown, the Constitutional provision would seem to exert no compulsion on the Congress to extend habeas corpus to persons detained abroad,

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[53] We have already argued that, constitutional considerations aside, the habeas corpus statutes do not extend the writ to any person detained abroad. *Supra,* pp. 15-49, 53-59.

[54] "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

and the courts have no authority to supply the omission.

2. It is a part of our legal tradition, moreover, that "By the Constitution a government is ordained and established 'for the United States of America' and not for countries outside of their limits. * * * The Constitution can have no operation in another country." *In re Ross,* 140 U. S. 453, 464. The Court there decided that the Fifth and Sixth Amendments' guarantees of jury trial and grand jury indictment were inapplicable to an American citizen charged with committing a crime in Japanese territorial waters and convicted by an American consular court sitting in Yokohoma. "The deck of a private American vessel, it is true, is considered for many purposes constructively as territory of the United States, yet persons on board of such vessels, whether officers, sailors, or passengers, cannot invoke the protection of the provisions referred to until brought within the actual territorial boundaries of the United States." 140 U. S. at 464. Conversely, the Court held, the law which determines the rights of citizens affected by the extraterritorial action of American officials overseas—such as consular courts—is not the Constitution. "When, therefore, the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two

countries may agree, the laws of neither one being obligatory upon the other." 140 U. S., at 464.[55]

It is consonant with these postulates—that the "Constitution can have no operation in another country," and that our officials exercising authority abroad are not subject to the particular prohibitions and directions of the Constitution[56]—to read the constitutional prohibition against suspension of habeas corpus as applying only where the restraint of liberty occurs on American soil. Just

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[55] "The Constitution and the laws of the United States, made in pursuance of it and treaties made under its authority, are to be the supreme law of the land; but not of any other land, nor for American citizens living in any other land." Letter on judicial extraterritorial rights from Secretary of State Frelinghuysen to the Chairman of the Senate Committee on Foreign Relations, April 29, 1882, Sen. Misc. Doc. No. 89, 47th Cong., 1st Sess., p. 14 (cited in the *Ross* case, 140 U. S. at 465).

For the history and practice of American consular courts and similar extraterritorial tribunals, see (in addition to *In re Ross, supra*), Secretary Frelinghuysen's letter, *supra*; 7 Op. Atty. Gen. 495; *In re Joseph Stupp*, 11 Blatch. 124, 145-149 (C. C. 2); *Casement* v. *Squier*, 46 F. Supp. 296 (W. D. Wash.), affirmed, 138 F. 2d 909 (C. A. 9); Note, *The United States Court for China* (1936), 49 Harv. L. Rev. 793; 2 Moore, *Digest of International Law* (1906), secs. 262-290; 2 Hackworth, *Digest of International Law* (1941), secs. 177-190.

[56] We do not mean to suggest that American officials on foreign missions receive their authority from a source independent of the Constitution, but only that they are not required to conform to the particular provisions intended to apply only within this country. See *supra*, p. 67. A parallel, but stricter, doctrine is imbedded in the decisions of this Court that while the Constitution governs our relations with unincorporated American territory or possessions, certain particular provisions, such as those concerning jury trial, are inapplicable. *Downes* v. *Bidwell*, 182 U. S. 244, 288-347; *Hawaii* v. *Mankichi*, 190 U. S. 197; *Dorr* v. *United States*, 195 U. S. 138, 140-149; *Balzac* v. *Porto Rico*, 258 U. S. 298, 304-305; *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 672-674.

as the citizen subject to American authority abroad has no constitutional right to a jury trial or to indictment—because these constitutional provisions do not operate in foreign lands—so he has no constitutional right to the privilege of habeas corpus until he is brought to this country.[57]

3. *Neely* v. *Henkel*, 180 U. S. 109, seems to us actually to have held habeas corpus unavailable to an American citizen in circumstances comparable to those presented by the current occupations of enemy lands. After the Spanish-American War, Cuba was occupied by American troops, and the American military governor established and confirmed a system of courts for Cuba, as well as a body of civil and criminal law. 180 U. S. at 117-119. Neely, an American employed in Cuba, was accused of violating certain provisions of the postal laws established and confirmed by the military governor. He fled to this country; and upon his arrest for return to Cuba for trial, he sought habeas corpus

[57] The prisoner in *In re Ross*, 140 U. S. 453, first sought a writ of habeas corpus when the ship on which he was being transported, after conviction, from Japan to imprisonment in Albany, reached San Francisco. 140 U. S. at 467.

Since the Army's policy has been, in general, to return citizens convicted by courts-martial overseas and sentenced to terms of longer than six months to the United States for imprisonment, habeas corpus is available to such prisoners on arrival here. Cf. *Wade* v. *Hunter*, 336 U. S. 684; *Humphrey* v. *Smith*, 336 U. S. 695. Women citizens convicted by the military government courts in Germany (now the courts of the High Commission) are returned to the United States immediately after final conviction, regardless of the length of sentence; male citizens convicted by those courts are returned, after final conviction, if their sentences exceed six months.

here on the ground, among others, that his extradition would be illegal since he would not be able to obtain habeas corpus in Cuba—if that should become necessary—and thus would there be deprived of a fundamental constitutional right. The Court, speaking through Mr. Justice Harlan (then the foremost exponent of the geographic extension of constitutional rights) rejected this contention because "those provisions [*i.e.*, 'the provisions of the Federal Constitution relating to the writ of *habeas corpus*, bills of attainder, *ex post facto* laws, trial by jury for crimes, and generally to the fundamental guarantees of life, liberty and property embodied in that instrument'] have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country." 180 U. S. at 122. See also *supra*, pp. 47, 66.

As we have pointed out (*supra*, pp. 65-66), the enemy countries now occupied or controlled by the United States are in the same status of a "foreign country or territory * * * occupied by or under the control of the United States" (180 U. S. at 111) as was Cuba after the War of 1898. The United States holds authority in those foreign regions by virtue of the enemies' defeat, and is free to establish tribunals and exercise governmental powers. *New Orleans* v. *Steamship Co.*, 20 Wall. 387, 393-394; *Dooley* v. *United States*, 182 U. S. 222, 230-231; *MacLeod* v. *United States*, 229 U. S. 416, 424-425. In those friendly foreign areas

where we also now have authority, it is by agreement with the foreign government, and the controlled domain remains alien territory. *In re Ross*, 140 U. S. 453, 464; *United States* v. *Spelar*, 338 U. S. 217, 219. In both cases—of enemy and non-enemy occupied areas—the region is "without the jurisdiction of the United States," and the American citizen who transgresses the rules of the occupying power is violating the laws of a foreign country and not of the United States, in the sense in which those terms were used in *Neely* v. *Henkel*. It follows from that holding that they are not constitutionally entitled to habeas corpus while they are held abroad.

4. Again, we stress that our argument is limited to the requirements of the Constitution. It may well be that it would be wise and just for Congress to make the writ accessible to citizens detained outside the country. But like so many other beneficent privileges, the Constitution does not compel Congress to make this provision, and it is for Congress to say whether the present right to the writ should be amplified, and what the conditions of the extension should be. *Supra*, pp. 31, 58-59, 70-71.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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MARCH 1950.

U. S. GOVERNMENT PRINTING OFFICE 1950 870111